LST REVIEW

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Promoting Observance of Human Rights and Freedoms; Views of the United Nations Human Rights Committee Relevant to Sri Lanka

LAW & SOCIETY TRUST

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Editor's Note ... ...

The coming into being of an international legal regime compelling countries, notwithstanding national sovereignty, to abide by basic norms relating to the protection of the rights of its citizens according to generally accepted principles in international law, is one of the great triumphs of the modern age. Unlike other regional mechanisms that ensure an overall supervision in respect of those regions and exercise considerable authority thereto, (ie; the European Court of Human Rights and the Inter-American Court of Human Rights), South Asia does not have a regional court which presides over its vast and highly diverse multitudes.

In that respect, the UN treaty bodies have assumed specific importance in relation to the grievances of South Asians where domestic laws and institutions fail. In particular, the Communication of Views by the United Nations Human Rights Committee (UNHRC) under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) has formidable impact in international law in respect of the countries against whom they are issued. Currently, only Nepal and Sri Lanka have subjected themselves to the reach of the First Optional Protocol as far as South Asia is concerned.

Accordingly, individuals subject to the jurisdiction of these two State parties, can submit individual communications to the Committee regarding acts, omissions, developments or events occurring after the date on which the Protocol entered into force for that State or from a decision relating to acts, omissions, developments or events after that date which are alleged to violate Covenant rights. The complainant should have exhausted all domestic remedies. Neither must the same matter be examined under another procedure of international investigation or settlement.

This Issue of the Review, responding to specific requests made by its readers who have found it difficult to obtain access to recent decisions of the UNHRC in relation to Sri Lanka, publishes three Communication of Views relating to the protection of certain basic rights of Sri Lankan citizens.

In a previous Issue, (see volume 14, Issue 190, August 2003), the LST Review published the Views of the UNHRC in the Jegetheeswaran Sarma Case (Communication No 950/2000 (Sri Lanka, 31/07/2003) CCPR/C/78/D/950/2000 (Jurisprudence) where a father whose son had been tortured and had thereafter 'disappeared' in state custody, appealed to Geneva.

The UNHRC found a violation of ICCPR, Article 7 (right not to be subjected to torture and ill treatment) in respect of not only the victim himself but also of his father, (the author of the communication), as well as the members of his family, given the pain and anguish that they had suffered and in addition, a violation of the rights of the victim under ICCPR, Article 9 (right to liberty and security). The State was put under obligation to prevent future

violations and provide the victim and his family with an effective remedy, including a through investigation into the disappearance and fate of the victim and adequate compensation for the violation of rights suffered.

In this Issue of the ***LST Review***, we publish firstly, the Communication of Views relating to a complaint made by an opposition parliamentarian at that time, that statements made by the Head of State alleging that he was acting in concert with the LTTE and thereafter given wide publicity by the "government-controlled" radio and television corporations, put his life at great risk and that the State party did not protect his life by refusing to grant him sufficient security despite the fact that he was receiving death threats thereafter. Neither did the State party investigate any of the complaints he made to the police on the issue of the death threats received against him.

The majority view of the UNHRC was that the publication and dissemination of the statements in question made by the Head of State acting under immunity enacted by the State party, (which were not denied by the State party) resulted in a violation of the author's right to security of person under ICCPR, Article 9, paragraph 1. Unanimously, it was also decided that the failure of the State party to investigate threats to the life of the author violated his right to security of person under the same article.

In the second Communication of Views, the UNHRC found that the pending nature of three indictments for criminal defamation served on the editor of the 'Ravaya' in 1996 and 1997 for several years, (including up to the time of the final submissions made by the parties), was in violation of ICCPR, Article 14, paragraph 3 (c), (right to be tried without undue delay). Additionally, the delay left the author in a situation of uncertainty and intimidation, despite his efforts to have the cases terminated, and had a chilling effect, which violated ICCPR, Article 19 (right to freedom of expression), read together with ICCPR, Article 2(3) (right to effective remedy).

An interesting facet of this case was that this violation of right to speedy trial had not been specifically pleaded by the author whose case before the UNHRC was originally based on a different argument; namely that the action of the Attorney General of Sri Lanka, in arbitrarily charging him with criminal defamation during the period 1993 to 1998, failed to properly exercise his discretion under statutory guidelines (which require a proper assessment of the facts as required in law for criminal defamation prosecution), and thereby violated his freedom of expression in terms of ICCPR, Article 19 as well as his right to equality and equal protection of the law in terms of ICCPR, Article 26.

The author also pleaded a violation of Article 2 (3) of the Covenant, based on the refusal of the Supreme Court to grant him leave to proceed with his fundamental rights application against the Attorney General, thereby depriving him of an effective remedy.

The UNHRC however declined to rule on both these grounds, instead restricting itself to a narrower finding of the right to be tried without undue delay. The complaint with regard to undue delay, in fact, arose during the long drawn out proceedings before the UNHRC and was not a factor that was in issue when the author first appealed to Sri Lanka's Supreme Court which refused leave to proceed on a different basis altogether. The willingness of the UNHRC to rule on the matter of the right to speedy trial without insisting that the author first raise this matter specifically before the domestic courts and then come before the Committee, needs to be noted.

The right to a fair trial arose in a somewhat similar context in regard to the third Communication of Views that we publish. This case concerned the appeal of a detainee in the Boosa prison who had been convicted and sentenced to fifty years imprisonment, solely on the strength of a confession obtained in terms of the Prevention of Terrorism Act No 48 of 1979 (as amended), (PTA) for having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and for having attacked four army camps with a view to achieving the said objective.

He appealed to the UNHRC, (after his appeal was dismissed by both the Court of Appeal and the Supreme Court), though his sentence was reduced), stating that the burden imposed on him under Section 16(2) of the PTA to prove that the confession was extracted under duress and was not voluntary in terms of Section 16(2), was impossible of fulfillment as he had been compelled to sign the confession only in the presence of the police officers concerned by whom he had been tortured.

Responding to this argument, the UNHRC found a violation of his right under ICCPR Article 14, paragraph 3 (g) (namely that no one shall "be compelled to testify against himself or confess guilt."), read together with ICCPR, Article 2, paragraph 3, and ICCPR Article 7. The State was directed to amend sections of the PTA that are incompatible with the guarantees of fair trial under the Covenant. In addition, the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in Case no. 6825/1994 was ruled to have resulted in a violation of the rights contained in ICCPR, Article 14, paragraphs 3(c), and 5, read together, which confers a right to review of a decision at trial without delay.

In addition to these three Communication of Views, we publish also the text of an individual communication submitted to the UNHRC in terms of the First Optional Protocol which raises important issues in regard to the rights of free expression and opinion as well as the right to a fair trial (in the context of contempt of court) and the general right to freedom from torture and cruel, inhuman or degrading treatment.

Kishali Pinto-Jayawardena

Convention Abbreviation: CCPR
Human Rights Committee
Seventy-fifth session
8 - 26 July 2002

Communication No 916/2000: Sri Lanka 26/07/2002 CCPR/C/75/D/916/2000 (Jurisprudence)

Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*

Seventy-fifth session

Communication No. 916/2000

Submitted by	: Mr. Jayalath Jayawardena
Alleged victim	: The author
State party	: Sri Lanka
Date of communication	: 23 February 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2002,

Having concluded its consideration of communication No. 916/2000, submitted to the Human Rights Committee by Mr. Jayalath Jayawardena under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, is Mr. Jayalath Jayawardena, a Sri Lankan citizen, residing in Colombo, Sri Lanka. He claims to be a victim of violations by Sri Lanka of the International

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[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Covenant on Civil and Political Rights. The author does not invoke any specific provision of the Covenant, however, the communication appears to raise issues under article 9, paragraph 1, of the Covenant. He is not represented by counsel.

The facts as submitted by the author

2.1 The author is a medical doctor and a member of the United National Party ("UNP") in Sri Lanka. At the time of his initial communication, he was an opposition Member of Parliament but in December 2001 his party obtained a majority in Parliament and he was appointed Minister of Rehabilitation, Resettlement and Refugees. From 1998, Mrs. Chandrika Bandaranaike Kumaratunga, the President of Sri Lanka, made public accusations, during interviews with the media, that the author was involved with the Liberation Tigers of Tamil Elam ("LTTE") and such allegations were given wide publicity by the "government-controlled" radio and television corporations. In addition, the same allegations appeared on the Daily News newspaper on 9 and 10 September 1998, and 5 January 2000, respectively.

2.2 On 3 January 2000, and during an interview broadcast over the state-owned television station, the President again accused the author of involvement with the LTTE. Two days later, a lawyer and leader of the All Ceylon Tamil Congress, who openly supported the LTTE, was assassinated by an unidentified gunman in Colombo. The author feared that he too would be murdered and that the President's accusations exposed him to many death threats by unidentified callers and to being followed by unidentified persons.

2.3 On 2 March 2000, the Secretary General of Parliament requested the Ministry of Defence to provide the author with the same security afforded to the Members of Parliament in the North-East of the country, as his work was concentrated in those provinces. He also stated that the author was in receipt of certain threats to his life and requested that he receive additional personal security. The Secretary General of Parliament confirmed in two letters to the author that he did not receive a response from the Ministry of Defence to his request. On 13 March 2000, the President accused the UNP of complicity with the LTTE in an interview published by the Far Eastern Economic Review.

2.4 On or around 15 March 2000, the author received two extra security guards, however they were not provided with "emergency communication sets" and the author was not provided with dark tinted glass in his vehicle. Such security devices are made available to all government Members of Parliament whose security is threatened, as well as providing them with more than 8 security guards.

2.5 In several faxes submitted by the author, he provides the following supplementary information. On 8 June 2001, a state-owned newspaper published an article in which it stated that the author's name had appeared in a magazine as an LTTE spy. After this incident, the author alleges to have received around 100 death threats over the telephone and was followed by several unidentified persons in unmarked vehicles. As a result of these calls, the author's family was in a state of "severe psychological shock." On 13 June 2001, the author made a complaint to the police and requested extra security, but this was not granted.

2.6 On 18 June 2001, the author made a statement to Parliament revealing the fact that his life and that of his family were in danger. He also requested the Speaker of the Parliament to refer his complaint to the "privileges committee."[1] Pursuant to his complaint to the Speaker a "select committee"[2] was set up to look into his complaint, however because of the "undemocratic prorogation to the parliament", this matter was not considered.[3]

2.7 In addition, the author made a complaint to the police against a Deputy Minister of the government who threatened to kill him. On 3 April 2001, the Attorney General instructed the "Director of Crimes of Police" to prosecute this Minister. However, on 21 June 2001, the Attorney General informed the Director of Crimes that he (the Attorney General) would have to re-examine this case again following representations made by the Deputy Minister's lawyer. The author believes that this is due to political pressure. On 19 June 2001, the author wrote to the Speaker of Parliament requesting him to advise the Secretary of the Ministry of Defence to provide him with additional security as previously requested by the Secretary General of Parliament.

2.8 On the following dates the President and the state-owned media made allegations about the author's involvement with the LTTE: 25 June 2001; 29 July 2001; 5 August 2001; 7 August 2001; and 12 August 2001. These allegations are said to have further endangered the author's life.

2.9 Furthermore, on 18 July 2001, the author alleges to have been followed by an unidentified gunman close to his constituency office. The author lodged a complaint with the police on the same day but no action was taken in this regard. On 31 August 2001, a live hand grenade was found at a junction near his residence.[4] During the parliamentary election campaign which ended on 5 December 2001, the author alleges that the President made similar remarks about the connection between the UNP and the LTTE.

Complaint

3.1 The author complains that allegations made by the President of Sri Lanka on the state-owned media, about his alleged involvement with the LTTE, put his life at risk. He claims that such allegations are tantamount to harassment and resulted from his efforts to draw attention to human rights issues in Sri Lanka. He claims that he has no opportunity to sue the President as she is immune from suit.

3.2 The author claims that the State party did not protect his life by refusing to grant him sufficient security despite the fact that he was receiving death threats.

3.3 The author further claims that the State party failed to investigate any of the complaints he made to the police on the issue of the death threats received against him.

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[1] No further information is provided on this committee.
[2] No further information is provided on this committee.
[3] No further information has been provided by the author on this matter.
[4] According to a newspaper article, provided by the author on this matter, an investigation was carried out and the officer-in-charge stated that the incident had nothing to do with the author.

State party's submission on the admissibility and merits of the communication

4.1 By letter of 6 September 2000, the State party made its submission on the admissibility of the communication and by letter of 3 July 2001, its submission on the merits. According to the State party, the author has not availed himself of any domestic remedies as required under article 2 of the Optional Protocol. It states that if the author believed that the President's allegations infringed his civil and political rights, there are domestic remedies available to him under the Constitution and the Penal Code of Sri Lanka, against the media, restraining it from publishing or broadcasting such information, or instituting proceedings against it. It also submits that, apart from the author's statement that the President is immune from suit, he has not claimed that he has no faith in the judicial system in Sri Lanka for the purposes of pursuing his rights and claiming relief in respect of the publication or broadcasting of the material.

4.2 The State party contests that the author has been receiving death threats from unidentified callers and has been followed by unidentified persons, as there is no mention of him making such complaints to the domestic authorities. In this context, it also states that the author's failure to report such threats is an important factor in assessing his credibility.

4.3 On the merits, the State party submits that as a Member of Parliament and a medical practitioner, the author led a very open life, participating in television programmes relating both to the political as well as the medical field. He actively took part in political debates both in the television and the print media, without any indication of restraint, which would normally have been shown by a person whose life is alleged to be "under serious threat." In this regard, the State party submits that in response to the allegations made by the President, the author issued a denial, which was given an equivalent amount of television, radio and press coverage in both the government and private sectors.

4.4 The State party also submits that the fact that the author made no complaint to the domestic authorities about receiving death threats and did not pursue available legal remedies against the media restraining them from publication of material considered to be prejudicial to him, indicates that the author is engaged in a political exercise in international fora , to bring discredit to the Government of Sri Lanka rather than vindicating any human right which has been violated. According to the State party, the fact that the author failed to refer to the violation of any particular right under the Covenant would also confirm the above hypothesis.

4.5 Furthermore, it is submitted that there is no link between the assassination of the leader of the All Ceylon Tamil Congress, who was a lawyer, and the President's allegations about the author. It states that the President did not refer to the leader of this party in the interview in question and states that he had been openly supporting the LTTE for a long period of time. According to the State party, there are many lawyers who appear for LTTE suspects in Sri Lankan courts but who have never been subjected to any form of harassment or threat, and there have been no complaints of such a nature to the authorities.

4.6 Finally, the State party submits that the President of Sri Lanka, as a citizen of this country, is entitled to express her views on matters of political importance, as any other person exercising the fundamental rights of freedom of expression and opinion.

Comments by the author

5.1 On the issue of admissibility, the author submits that his complaint does not relate to the Sri Lankan press nor the Sri Lankan police but to the President's allegations about his involvement with the LTTE. He submits that the President herself should be accountable for the statements made against him by her. However, as the President has legal immunity, no domestic remedy exists that can be exhausted. The author quotes from the Sri Lankan Constitution,

- 30-(1) "There shall be a President of the Republic of Sri Lanka who is the head of the State, the head of the executive and of the Government and the Commander-in-Chief of the Armed Forces.

- 35-(1) While any person holds office as President no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity."

5.2 With respect to the State party's submission that the author made no official complaint about the death threats and necessity for increased security, the author reiterates what attempts he made in this regard, stating that he made many complaints to the police and submits a copy of one such complaint, dated 11 January 2000.

5.3 The author adds that on 18 July 2001 the Speaker of the Parliament requested the Secretary of the Ministry of Defence to provide the author with increased security. Similarly, on 23 July 2001, the leader of the opposition also wrote to the Secretary with the same request.[5] In a letter, dated 27 July 2001, the Secretary informed the Leader of the Opposition that both of these letters were forwarded to the President for consideration. The author states that he does not expect to receive such increased security as the President is also the Commander-in-Chief of the Police and Armed Forces.

5.4 The author refers to observations by international organisations on this issue who referred to the allegations made by the President and requested her to take steps to protect the author's life, including the investigation of threats to his life. According to the author, the President did not respond to these requests.

5.5 Finally, the author states that, the President did openly and publicly label the leader of the All Ceylon Tamil Congress as a supporter of the LTTE but in any event he does not intend the Committee to investigate the circumstances of his death.

[5] The author draws the Committee's attention to the following paragraph of this letter, "Mr. Jayawardena has made several complaints to the local police and the IGP himself all of which have been to no avail. So much so that as recently as the 18th of July 2001 an unidentified gunman was found loitering outside his home. It is regrettable to note that in spite of all this no action has been taken by your Ministry to accede to the request of the Speaker."

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee notes the author's claim that his rights were violated, as he received death threats following allegations made by the President on his involvement with the LTTE, and his claim that he has no remedy against the President herself, as she is immune from suit. The State party insists that the author could have taken a legal action against the media which broadcast or published the President's allegations. While the State party does not contest that, due to her immunity, the President could not have been the subject of a legal action, it does not indicate whether the author had any effective remedies to obtain reparation for the eventual harm to his personnel security which the President's allegations may have caused. For these reasons the Committee finds that the author has exhausted domestic remedies, and this part of the communication is admissible. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant.

6.4 In relation to the issue of the State party's failure to investigate his claims of death threats, the Committee notes the State party's argument that the author did not exhaust domestic remedies as he failed to report these complaints to the appropriate domestic authorities. From the information provided, the Committee observes that the author made at least two complaints to the police. For this reason, and because the State party has not explained what other measures the author could have taken to seek domestic redress, the Committee is of the view that the author has exhausted domestic remedies in this regard. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant. The Committee finds no other reason to question the admissibility of this aspect of the communication.

6.5 In relation to the issue of the State party's failure to protect the author by granting him increased security the Committee notes the author's argument that the level of security afforded to him was inadequate and not at the level afforded to other Members of Parliament, in particular to Members of Parliament working in the North-East of the country. The Committee notes, that although the State party did not specifically respond on this issue, the author does affirm that he received "two extra security guards" but provides no further elaboration on the exact level of security afforded to him as against other Members of Parliament. The Committee, therefore, finds that the author has failed to substantiate this claim for the purposes of admissibility.

6.6 The Committee therefore decides that the parts of the communication which relate to the claim in respect of the President's allegations against the author, and the State party's failure to investigate the death threats against the author are admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 In respect of the author's claim that the allegations made publicly by the President of Sri Lanka put his life at risk, the Committee notes that the State party has not contested the fact that these statements were in fact made. It does contest that the author was the recipient of death threats subsequent to the President's allegations but, on the basis of the detailed information provided by the author, the Committee is of the view that due weight must be given to the author's allegations that such threats were received after the statements and the author feared for his life. For these reasons, and because the statements in question were made by the Head of State acting under immunity enacted by the State party, the Committee takes the view that the State party is responsible for a violation of the author's right to security of person under article 9, paragraph 1, of the Covenant.

7.3 With regard to the author's claim that the State party violated his rights under the Covenant by failing to investigate the complaints made by the author to the police in respect of death threats he had received, the Committee notes the State party's contention that the author did not receive any death threats and that no complaints or reports of such threats were received. However, the State party has not provided any specific arguments or materials to refute the author's detailed account of at least two complaints made by him to the police. In the circumstances, the Committee concludes that the failure of the State party to investigate these threats to the life of the author violated his right to security of person under article 9, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Sri Lanka of article 9, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Individual opinion, partially dissenting, by Committee members Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, and Mr. Maxwell Yalden]

We share the Committee's view regarding the State party's failure to investigate the death threats against the author.

We disagree, however, on the Committee's decision that the author's claim of a violation of his right under article 9, paragraph 1, of the Covenant by the allegations by the President through the State owned media against him (see above paragraph 3.1), is admissible under the Optional Protocol. In our view the author has not exhausted domestic remedies.

As stated above, the author's allegations related to the allegations by the President through the State owned media, but the author has not explained why he failed to take legal action against the media or to go to the courts to stop any of those allegations made against him. The fact that the President as head of State enjoys personal immunity from suit does not mean that there was no procedure of redress against other state or state controlled organs. Therefore, in our view, this part of the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol and should not have been dealt with in the merits.

Convention Abbreviation: CCPR
Human Rights Committee
Eighty-first session
5 - 30 July 2004

Communication No. 909/2000: Sri Lanka 26/08/2004
CCPR/C/81/D/909/2000 (Jurisprudence)

Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*

Eighty-first session

Communication 909/2000

Submitted by	: Victor Ivan Majuwana Kankanamge (represented by counsel, Mr Suranjith Richardson Kariyawasam Hewamanna)
Alleged victim	: The author
State party	: Sri Lanka
Date of initial communication	: 17 December 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2004,

Having concluded its consideration of communication No. 909/2000, submitted to the Human Rights Committee by Victor Ivan Majuwana Kankanamge, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 17 December 1999, is Mr. Victor Ivan Majuwana Kankanamge, a Sri Lankan citizen, born on 26 June 1949, who claims to be a victim of a violation

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[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

by Sri Lanka of articles 2 (3), 3, 19 and 26 of the Covenant. The communication also appears to raise issues under article 14(3)(c). The author is represented by counsel.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 11 June 1980 and 3 January 1998 respectively. Sri Lanka also made a declaration according to which "[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional Protocol recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

1.3 On 17 April 2000, the Committee, acting through its Special Rapporteur for new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as presented by the author

2.1 The author is a journalist and editor of the newspaper "Ravaya". Since 1993, he has been indicted several times for allegedly having defamed ministers and high level officials of the police and other departments, in articles and reports published in his newspaper. He claims that these indictments were indiscriminately and arbitrarily transmitted by the Attorney-General to Sri Lanka's High Court, without proper assessment of the facts as required under Sri Lankan legislation, and that they were designed to harass him. As a result of these prosecutions, the author has been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed.

2.2 At the time of the submission of the communication, three indictments against the author, dated 26 June 1996 (Case Nr. 7962/96), 31 March 1997 (Case Nr. 8650/07), and 30 September 1997 (Case Nr. 9128/97), were pending before the High Court.

2.3 On 16 February 1998, the author applied to the Supreme Court for an order invalidating these indictments, on the ground that they breached articles 12(1) and 14(1)(a) of the Sri Lankan Constitution, guaranteeing equality before the law and equal protection of the law, and the right to freedom of expression. In the same application, the author sought an interim order from the Supreme Court to suspend the indictments, pending the final determination of his application. On 3 April 1998, the Supreme Court decided that the author had not presented a *prima facie* case that the indictments were discriminatory, arbitrary or unreasonable, and refused him leave to proceed with the application.

The Complaint

3.1 The author claims that by transmitting to the High Court indictments charging him with defamation, the Attorney-General failed to properly exercise his discretion under statutory guidelines (which require a proper assessment of the facts as required in law for criminal defamation prosecution), and therefore exercised his power arbitrarily. By doing so, the Attorney-General violated the author's freedom of expression under article 19 of the Covenant, as well as his right to equality and equal protection of the law guaranteed by article 26.

3.2 The author also claims that his rights under article 2, paragraph 3, of the Covenant were violated because the Supreme Court refused to grant him leave to proceed with the application to suspend the indictments and thereby deprived him of an effective remedy.

3.3 Finally, the author claims a violation of article 3, but offers no explanation of that claim.

State party's observations on admissibility

4.1 On 17 March 2000, the State party provided observations only on the admissibility of the communication, as authorized by the Committee's Special Rapporteur on Communications pursuant to rule 91 (3) of the Committee's Rules of Procedure.

4.2 The State party considers the communication inadmissible because it relates to facts that occurred before the Optional Protocol entered into force for Sri Lanka, that is 3 January 1998. Moreover, upon ratification of the Protocol, Sri Lanka entered a reservation by which the State party recognized the competence of the Committee to consider communications from authors who claim to be victims of a violation of the Covenant only as a consequence of acts, omissions, developments or events that occurred after 3 January 1998. The State party submits that, since the alleged violations of the Covenant were related to indictments that were issued by the Attorney-General prior to that date, the claims are covered by the reservation and therefore inadmissible.

4.3 The State party contends that article 19(3) of the Covenant does not support the author's claim of a violation, because under that provision the exercise of the rights protected carries with it special duties and responsibilities and may be subject to restrictions provided by law which are necessary for the respect of the rights or reputations of others.

4.4 The State party argues that the author has not exhausted all available domestic remedies, which would have included representations to the Attorney-General regarding the indictments, or complaining to the Parliamentary Commissioner for Administration (the Ombudsman) or the National Human Rights Commission.

4.5 Finally, the State party considers that the author cannot invoke the jurisdiction of the Committee under article 2 (3) of the Covenant, because he has not established a violation of any of the rights under the Covenant for which remedies are not available under the Sri Lankan Constitution.

Comments by the author

5.1 On 16 June 2000, the author responded to the State party's observations. On the competence of the Committee *ratione temporis*, and the State party's reservation on the entry into force of the Optional Protocol, he recalls the Human Rights Committee's General Comment No. 24, according to which "the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date." He affirms that the violations he has alleged are continuing violations, so that the Committee has competence *ratione temporis*.

5.2 By reference to paragraph 13 of General Comment No. 24, the author argues that even acts or events that occurred prior to the entry into force of the Optional Protocol for the State party should be admitted as long as they occurred after the entry into force of the Covenant for the State party.

5.3 On the State party's argument that the complaint should be rejected as inadmissible because the restrictions under article 19 (3) of the Covenant are attracted, the author replies that this is not an objection to admissibility but addresses the merits of the communication.

5.4 On the issue of exhaustion of domestic remedies, the author affirms that the Supreme Court is the only authority with jurisdiction to hear and make a finding on infringements of fundamental rights by executive or administrative action. As to representations to the Attorney-General, the author notes that there is no legal provision for making such representation once indictments have been filed, and in any case such representations would not have been effective since the Attorney General was himself behind the prosecutions. As regards a complaint to the Ombudsman or the National Human Rights Commission, the author stresses that these bodies are appointed by the President of Sri Lanka, and that they are vested only with powers of mediation, conciliation and recommendations but have no powers to enforce their recommendations. Only the Supreme Court is vested with the power to act on his complaint and to grant effective redress.

5.5 In relation to the State party's argument on article 2, paragraph 3, of the Covenant the author argues that a State party cannot invoke its internal laws as a reason for non-compliance with obligations under the Covenant.

Decision on admissibility

6.1 At its 72nd session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it.

6.2 The Committee noted that the State party contested the Committee's competence *ratione temporis* because, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol. In

this respect, the Committee considered that the alleged violations had continued. The alleged violations had occurred not only at the time when the indictments were issued, but were continuing violations as long as there had not been a decision by a Court acting on the indictments. The consequences of the indictments for the author continued, and indeed constituted new alleged violations so long as the indictments remained in effect.

6.3 As regards the State party's claim that the communication was inadmissible because the author had failed to exhaust domestic remedies, the Committee recalled that the Supreme Court is the highest court of the land and that an application before it constituted the final domestic judicial remedy. The State party had not demonstrated that, in the light of a contrary ruling by the Supreme Court, making representations to the Attorney-General or complaining to the Ombudsman or to the National Human Rights Commission would constitute an effective remedy. The Committee therefore found that the author had satisfied the requirement of article 5, paragraph 2 (b) of the Optional Protocol and declared the communication admissible on 6 July 2001.

6.4 On 6 July 2001, the Committee declared the communication admissible. Whilst it specifically determined that the author's claims under articles 2(3) and 19 should be considered on the merits, it left open the possibility of considering the author's other claims under articles 3, 14(3)(c) and 26.

State party's observations on the merits

7.1 On 4 April 2002, the State party commented on the merits of the communication.

7.2 The State party draws attention to the fact that the indictments challenged by the author in his application to the Supreme Court were served during the term of office of two former Attorneys-General. It makes the following observations on certain aspects of the indictments in question:

- Regarding indictment Nr. 6774/94 of 26 July 1994, further to an article written about the Chief of the Sri Lankan Railway, the State party notes that this indictment was withdrawn and could not be challenged before the Supreme Court, because it had been issued by a different Attorney-General than the one in office at the time of the application to the Supreme Court.

- Regarding indictment Nr. 7962/96 of 26 June 1996, which related to an article about the Minister of Fisheries, the State party notes that the information on which the article was based was subject to an official investigation, which allegedly confirmed the veracity of the information in question. This was never presented to the Attorney-General and could still be transmitted with a view to securing a withdrawal of the indictment.

- Regarding indictment Nr. 9128/97 of 30 September 1997, which related to an article about the Inspector General of Police (IGP) and to the alleged shortcomings of a criminal investigation in a particular case, the State party contends that the prosecution acted properly, in the best interest of justice, and in accordance with the relevant legal procedures.

7.3 The State party notes that, in addition to those complaints which led to criminal proceedings, there were 9 defamation complaints filed against the author between 1992 and 1997 in relation to which the Attorney-General decided *not* to issue criminal proceedings.

7.4 The State party underlines that the offence of criminal defamation, defined in section 479 of the Penal Code, may be tried summarily before the Magistrate's Court or the High Court, but no prosecution for this offence may be instituted by the victim or any other person, except with the approval of the Attorney-General. Moreover, for such an offence, the Attorney General has the right, in accordance with section 393 (7) of the Code of Criminal Procedure, to file an indictment in the High Court or to decide that non-summary proceedings will be held before the Magistrate's Court, "having regard to the nature of the offence or any other circumstances." The Attorney-General thus has a discretionary power under this provision.

7.5 The State party considers that, in the present case, the Attorney-General acted in accordance with the law and his duty was exercised "without any fear or favour", impartially and in the best interest of justice.

7.6 Regarding the Supreme Court's jurisdiction, the State party recalls that leave to proceed for an alleged breach of fundamental rights is granted by at least two judges and that the author was given an opportunity to present a *prima facie* case of the alleged violations complained about. The Supreme Court, after exhaustively analyzing the discretionary power of the Attorney-General and examining the material submitted to it in respect of the numerous complaints against the author, was of the opinion that the indictments served on the author were not arbitrary and did not constitute a continued harassment or an intention to interfere with his right to freedom of expression. In this connection, it took into account four previous indictments against the author, and concluded that they did not amount to harassment, because three were withdrawn or discontinued, and there was nothing to suggest any impropriety on the part of the prosecution. Moreover, during the same period, the Attorney General had refused to take action on nine other complaints referred to in 7.3 above.

Author's comments

8.1 By submission of 17 June 2002, the author contended that the State party avoided the main issue of his complaint, failing to explain why the Attorney General decided to file direct indictments in the High Court. In his opinion, the essence of the complaint is that, from 1980, the State party's government favoured important officials by prosecuting those critical of their actions for defamation – a minor offence otherwise triable by a magistrate - directly in the High Court. In the author's case, while conceding that the Attorney General's discretion was not absolute or unfettered, the Supreme Court did not call the Attorney General to explain why he sent these indictments to the High Court. The Supreme Court carefully examined the three contested indictments and summarily refused leave to proceed to his application, which deprived him of the opportunity to establish a breach of the rights to equality and freedom of expression. The author considers that the Supreme Court overlooked that the media exercise their freedom of expression in trust for the public, and that heads of government and public officials are liable to greater scrutiny.

8.2 The author considers that, in its comments on the merits, the State party failed to explain why it believed that the Attorney General acted "without fear or favour", in the best interest of justice and why a direct indictment was preferred to a non summary inquiry.

8.3 The author considers that in examining defamation charges, the following elements are relevant:

- The offence is normally tried in the Magistrate Court;
- The Attorney General's approval is required for filing defamation proceedings in the Magistrate Court;
- The offence is amenable for settlement when tried before the Magistrate Courts but not before the High Court;
- Finger printing is only done after conviction in the Magistrate Court while it is done in the High Court when the indictment is served – the author was finger printed in the course of each of the proceedings against him.

8.4 The author finally submits that the 9 cases referred to by the State party in which the Attorney General declined prosecution is no argument in support of the impartiality of the Attorney General, since the complainants in these other cases were either not influential, or were opponents to the government.

8.5 On 25 June 2004, the author's counsel advised that the outstanding indictments had been withdrawn.

Reconsideration of admissibility and examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol. It considers that no information has been offered by the author in support of his claim of a violation of article 3, and accordingly declares this part of the communication inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9.2 On the merits, the Committee first notes that, according to the material submitted by the parties, three indictments were served on the author on 26 June 1996, 31 March 1997, and 30 September 1997 respectively. At the time of the final submissions made by the parties, none of these indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although the author has not raised such a claim in his initial communication, the Committee, consistent with its previous jurisprudence, is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of article 14, paragraph 3 (c), of the Covenant.

9.3 Regarding the author's claim that the indictments pending against him in the High Court constitute a violation of article 19 of the Covenant, the Committee has noted the State party's arguments that, when issuing these indictments, the Attorney General exercised his power under section 393 (7) of the Code of Criminal Procedure "without any fear or favour", impartially and in the best interest of justice.

9.4 So far as a violation of article 19 is concerned, the Committee considers that the indictments against Mr. Kankanamge all related to articles in which he allegedly defamed high State party officials and are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Having regard to the nature of the author's profession and in the circumstances of the present case, including the fact that previous indictments against the author were either withdrawn or discontinued, the Committee considers that to keep pending, in violation of article 14, paragraph 3(c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of article 19 of the Covenant, read together with article 2(3).

9.5 In light of the Committee's conclusions above, it is unnecessary to consider the author's remaining claims.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), and article 19 read together with article 2(3) of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Convention Abbreviation: CCPR
Human Rights Committee
Eighty-first session
5- 30 July 2004

Communication No. 1033/2004: Sri Lanka 26/08/2004 CCPR/C/81/D/1033/2001 (Jurisprudence)

Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*

Eighty-first session

Communication No. 1033/2001

Submitted by : Mr. Nallaratnam Singarasa (represented by counsel, Mr. V. S. Ganesalingam of Home for Human Rights as well as Interights)

Alleged victim : The author

State party : Sri Lanka

Date of communication: 19 June 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 2004,

Having concluded its consideration of communication No. 1033/2001, submitted to the Human Rights Committee on behalf of Mr. Nallaratnam Singarasa under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

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* [Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Nallaratnam Singarasa, a Sri Lankan national, and a member of the Tamil community. He is currently serving a 35 year sentence at Boosa Prison, Sri Lanka. He claims to be a victim of violations of articles 14, paragraphs 1, 2, 3 (c), (f), (g), and 5, and 7, 26, and 2, paragraphs 1, and 3, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. V.S. Ganesalingam of Home for Human Rights as well as Interights.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 11 September 1980 and the first Optional Protocol on 3 January 1998.

Facts as submitted by the author

2.1 On 16 July 1993, at about 5a:m, the author was arrested, by Sri Lankan security forces while sleeping at his home. 150 Tamil men were also arrested in a "round up" of his village. None of them were informed of the reasons for their arrest. They were all taken to the Komathurai Army Camp and accused of supporting the Liberation Tigers of Tamil Eelam (known as "the LTTE"). During his detention at the camp, the author's hands were tied together, he was kept hanging from a mango tree, and was allegedly assaulted by members of the security forces.

2.2 On the evening of 16 July 1993, the author was handed over to the Counter Subversive Unit of the Batticaloa Police and detained "in the army detention camp of Batticaloa Prison". He was detained pursuant to an order by the Minister of Defence under section 9(1) of the Prevention of Terrorism Act No. 48 of 1979 (as amended by Act No. 10 of 1982 and No. 22 of 1988) (hereinafter "the PTA"), which provides for detention without charge up to a period of eighteen months (renewable by order every three months), if the Minister of Defence "has reason to believe or suspect that any person is connected with or concerned in any unlawful activity".[1] The detention order was not served on the author and he was not informed of the reasons for his detention.

2.3 During the period from 17 July to 30 September 1993, three policemen including a Police Constable (hereinafter "the PC") of the Criminal Investigation Department (hereinafter "the CID"), assisted by a former Tamil militant, interrogated the author. For two days after his arrest, he alleges that he was subjected to torture and ill-treatment, which included being pushed into a water tank and held under water, and then blindfolded and laid face down and assaulted. He was questioned in broken Tamil by the police officers. He was held in incommunicado detention and was not afforded legal representation or interpretation facilities; nor was he given any opportunity

[1] Section 9(1) of the PTA provides as follows: "Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time."

to obtain medical assistance. On 30 September 1993, the author allegedly made a statement to the police.

2.4 Sometime in August 1993, the author was first brought before a Magistrate, and remanded back into police custody. He remained in remand pending trial, without any possibility of seeking or obtaining bail, pursuant to section 15(2) of the PTA.[2] The Magistrate did not review the detention order, pursuant to section 10 of the PTA, which states that a detention order under section 9 of the PTA is final and shall not be called in question before any court.[3]

2.5 On 11 December 1993, the author was produced before the Assistant Superintendent of Police (hereinafter "the ASP") of the CID and the same PC who had previously interrogated him. He was asked numerous personal questions about his education, employment and family. As the author could not speak Sinhalese, the PC interpreted between Tamil and Sinhalese. The author was then requested to sign a statement, which had been translated and typed in Sinhalese by the PC. The author refused to sign as he could not understand it. He alleges that the ASP then forcibly put his thumbprint on the typed statement. The prosecution later produced this statement as evidence of the author's alleged confession. The author had neither *external* interpretation nor legal representation at this time.

2.6 In September 1994, after over fourteen months in detention, the author was indicted in the High Court in three separate cases.

a) On 5 September 1994, he was indicted in Case no. 6823/94, together with several named and un-named persons, of having committed an offence under sections 2(2)(ii), read together with section 2(1)(f) of the PTA, of having caused "violent acts to take place, namely, receiving armed combat training under the LTTE Terrorist Organisation", at Muttur, between 1 January and 31 December 1989.

b) On 28 September 1994, he was indicted in Case no. 6824/94, together with several other named persons and persons unknown, of having committed an offence under section 2(1)(a), read together with section 2(2)(i), of the PTA, of having caused the death of army officers at Arantawala, between 1 and 30 November 1992.

c) On 30 September 1994, he was indicted in Case no. 6825/94, together with several other named persons and persons unknown, on five counts, the first under section 23(a)of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 with the Public Security (Amendment) Act No. 28 of 1988, of having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and the remaining four under section 2(2)(ii), read together with section 2(1)(c), of the PTA, of having attacked four army camps (at Jaffna Fort, Palaly, Kankesanthurai and Elephant Pass, respectively), with a view to achieving the objective set out in count one.

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[2] Section 15(2) of the PTA (as amended by Act. 10 of 1982) provides as follows: "Upon the indictment being received in the High Court against any person in respect of any offence under this Act or any offence to which the provisions of section 23 shall apply, the Court shall, in every case, order the remand of such person until the conclusion of the trial." The author makes no specific claim with respect to this issue.

[3] Section 10 of the PTA provides as follows: "An order made under section 9 shall be final and shall not be called into question in any court or tribunal by way of writ or otherwise."

2.7 On the date of submission of the communication, the author had not been tried in Cases nos. 6823/94 and 6824/94.

2.8 On 30 September 1994, the High Court assigned the author State-appointed counsel. This was the first time the author had access to a legal representative since his arrest. He later retained private counsel. He had interpretation facilities throughout the legal proceedings; he pleaded not guilty to the charges.

2.9 On 12 January 1995, in an application to the High Court, defence counsel submitted that there were visible marks of assault on the author's body, and moved for a medical report to be obtained. On the Court's order, a Judicial Medical Officer then examined him. According to the author, the medical report stated that the author displayed scars on his back and a serious injury, in the form of a corneal scar on his left eye, which resulted in permanent impairment of vision. It also stated that "injuries to the lower part of the left back of the chest and eye were caused by a blunt weapon while that to the mid back of the chest was probably due to application of sharp force."

2.10 On 2 June 1995, the author's alleged confession was the subject of a *voir dire* hearing by the High Court, at which the ASP, PC and author gave evidence, and the medical report was considered. The High Court concluded that the confession was admissible, pursuant to section 16(1) of the PTA, which renders admissible any statement made before a police officer not below the rank of an ASP, provided that it is not found to be irrelevant under section 24 of the Evidence Ordinance. Section 16(2) of the PTA put the burden of proof that any such statement is irrelevant on the accused.[4] The Court did not find the confession irrelevant, despite defence counsel's motion to exclude it on the grounds that it was extracted from the author under threat.

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[4] Section 16 of the PTA provides as follows:

"(1) Notwithstanding the provisions of any other law, where any person is charged with an offence under this Act, any statement made by such person at any time, whether –

(a) it amounts to a confession or not;

(b) made orally or reduced to writing;

(c) such person was or was not in custody or presence of a police officer;

(d) made in the course of an investigation or not;

(e) it was or was not wholly or partly in answer to any question, may be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance: Provided however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent."

(2) The burden of proving that any statement referred to in subsection (1) is irrelevant under Section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant.

(3) Any statement admissible under subsection (1) may be proved as against any other person charged jointly with the person making the statement, if and only if, such statement is corroborated in material particulars by evidence other than the statements referred to in subsection (1)."(*emphasis added*). The author notes that section 17 of the PTA further provides that sections 25, 26 and 30 of the Evidence Ordinance, which include additional restrictions on the admissibility of confessions, are not applicable in any proceedings under the PTA. Section 24 of the Evidence Ordinance provides as follows: "A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

2.11 According to the author, the High Court gave no reasons for rejecting the medical report despite noting itself that there were "injury scars presently visible on the [author's] body" and acknowledging that these were sequels of injuries "inflicted before or after this incident." In holding that the confession was voluntary, the High Court relied upon the author's failure to complain to anyone at any time about the beatings, and found that his failure to inform the Magistrate of the assault indicated that he had not behaved as a "normal human being." It did not consider the author's testimony that he had not reported the assault to the Magistrate for fear of reprisals on his return to police custody. 2.12 On 29 September 1995, the High Court convicted the author on all five counts, and on 4 October 1995, sentenced him to 50 years imprisonment. The conviction was based solely on the alleged confession. 2.13 On 9 October 1995, the author appealed to the Court of Appeal, seeking to set aside his conviction and sentence. On 6 July 1999, the Court of Appeal affirmed the conviction but reduced the sentence to a total of 35 years. On 4 August 1999, the author filed a petition for special leave to appeal in the Supreme Court of Sri Lanka, on the ground that certain matters of law arising in the Court of Appeal's judgment should be considered by the Supreme Court.[5] On 28 January 2000, the Supreme Court of Sri Lanka refused special leave to appeal.

The complaint

3.1 The author claims a violation of article 14, paragraph 1, of the Covenant, as he was convicted by the High Court on the sole basis of his alleged confession, which is alleged to have been made in circumstances amounting to a violation of his right to a fair trial. Basic procedural guarantees that safeguard the reliability of a confession and its voluntariness were omitted in this case. In particular, the author submits that his right to a fair trial was breached by the domestic courts' failure to take into consideration the absence of counsel and the lack of interpretation while making the alleged confession, and the failure to record the confession or to employ any other safeguards to ensure that it was given voluntarily. The author submits that the appellate courts' failure to consider these issues is inconsistent with the right to a fair trial and argues that the trial court's failure to consider other exculpatory evidence, in preference to reliance on the confession, is indicative of its lack of impartiality and the manifestly arbitrary nature of the decision. He adds that it was incumbent upon the appellate courts to intervene in this situation where evidence was simply disregarded.

3.2 The author claims that the delay of four years between his conviction and denial of leave to appeal to the Supreme Court amounted to a violation of article 14, paragraph 3(c). He claims a violation of article 14, paragraph 3(f), as he was not provided with a qualified and *external* interpreter when he was questioned by the police. He could neither speak nor read Sinhalese, and without an interpreter was unable adequately to understand the questions put to him or the statements, which he was allegedly forced to sign.

3.3 The author claims that reliance on his confession, in the given circumstances, and in a situation in which the burden was on him to prove that the confession was not made voluntarily, rather than on the prosecution to prove that it was made voluntarily, amounts to a violation of his rights under article 14, paragraph 3(g). To him, this provision requires that the prosecution prove their case

[5] Article 128 of the Constitution permits appeal to the Supreme Court only on matters of law.

without resort to evidence "obtained through coercion or oppression in defiance of the will of the accused," and prohibits treatment, which violates the rights of detainees to be treated with respect for the inherent dignity of the human person.[6] He invokes the Committee's General Comment No. 20, which states that "the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment", and observes that measures required in this respect would include, *inter alia*, provisions against incommunicado detention, and prompt and regular access to lawyers and doctors.[7]

3.4 The author claims a violation of article 14, paragraph 2, as, in light of the existence of the confession, which was considered a voluntary one, the onus was placed on the author to establish his innocence and therefore was not treated as innocent until proven guilty as required by this provision. The author claims that section 16(2) of the PTA shifts the burden on the accused to prove that any statement, including a confession, was *not* made voluntarily and therefore should be excluded as evidence, and as such is itself incompatible with article 14, paragraph 2. In particular, where the confession was elicited without safeguards and with complaints of torture and ill-treatment, the application of section 16(2) of the PTA amounts to a violation of article 14, paragraph 2. The author claims a violation of article 14, paragraph 5, because of the decision of the Court of Appeal to uphold the conviction despite the abovementioned "irregularities."

3.5 Article 7 is said to have been violated with respect to the treatment described in paragraphs 2.1 and 2.3 above. On account of *ratione temporis* considerations (see para.3.11), the author submits that the torture is principally relevant to the fair trial issues, addressed above. However, in addition, it is submitted that there is a continuing violation of the rights protected by article 7, insofar as Sri Lankan law provides no effective remedy for the torture and ill-treatment to which the author was already subjected. The author submits that, both through its law and practice, the State party condones such violations, contrary to article 7, read together with the positive duty to ensure the rights protected in article 2, paragraph 1, of the Covenant.

3.6 The author claims that the decision to admit the confession, obtained through alleged violations of his rights, and to rely on it as the sole basis for his conviction, violated his rights under article 2, paragraph 1, as the State party failed to "ensure" his Covenant rights. It is also claimed that the application of the PTA itself violated his rights under articles 14, and 2, paragraph 1.

3.7 The author claims a violation of article 2, paragraph 3, read together with articles 7 and 14, as the constitutional bar to challenging sections 16 (1) and (2) of the PTA effectively denies the author an effective remedy for the torture to which he was subjected and his unfair trial. The PTA provides for the admissibility of extra-judicial confessions obtained in police custody and in the absence of counsel, and places the burden of proving that such a confession was made "under threat" on the accused.[8] In this way, the law itself has created a situation where rights under article 7 may be violated without any remedy available. The State must enforce the prohibition on torture and ill-treatment, which includes taking "effective legislative, administrative, judicial and

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[6] *Saunders* v *UK* (1996) 23 EHRR 313, CCPR General Comment No. 13, of 13 April 1984; *Kelly* v *Jamaica*, Case no.253 /87, Views adopted on 4 August 1991.

[7] CCPR General Comment No. 20, of 10 March 1992.

[8] In this respect, the author notes that the recent report of the United Nations Special Rapporteur on Summary and Extra Judicial Executions refers to repeated allegations of confessions being extracted under torture from persons accused of offences under the PTA Report by Special Rapporteur, Mr. Bacre Waly Ndiaye, Addendum, submitted pursuant to Commission on Human Rights resolution 1997/61, E/CN.4/1998/68/Add.2, 12 March 1998.

other measures to prevent torture in any territory under its jurisdiction."[9] Thus, if in practice legislation encourages or facilitates violations, then at a minimum this falls foul of the positive duty to take all necessary measures to prevent torture and inhuman punishment. The author claims a separate violation of article 2, paragraph 3, alone, as the explicit ban under Sri Lankan law on constitutional challenges to enacted legislation prevented the author from challenging the operation of the PTA.

3.8 The author claims that the trial and appellate courts' failure to exclude the author's alleged confession, despite its having been made in the absence of a qualified and independent interpreter, amounted to a breach of his right not to be discriminated against under article 2, paragraph 1, read together with article 26. He claims that the application of the PTA resulted in, and continues to cause, indirect discrimination against members of the Tamil minority, including himself.

3.9 The author claims a violation of article 14, paragraph 3(c), in relation to cases nos. 6823/94 and 6824/94, as he was detained pending trial for over seven years since his initial indictments (eight since his arrest), and had not been tried on the date of submission of his communication.

3.10 The author submits that he has exhausted domestic remedies, as he was denied leave to appeal to the Supreme Court. As regards constitutional remedies, he notes that the Sri Lankan Constitution (article 126(1)) only permits judicial review of executive or administrative action, it explicitly prohibits any constitutional challenge to legislation already enacted (article 16, article 80(3) and article 126(1)).[10] The courts have similarly held that judicial review of judicial action is not permissible.[11] Thus, he was unable to seek judicial review of any of the judicial orders applicable to his case, or to challenge the constitutionality of the provisions of the PTA, which authorized his detention pending trial (in respect of Cases nos. 6823/94 and 6824/94), the admissibility of his alleged confession, and the shifted burden of proof regarding the admissibility of the confession.

3.11 The author argues that the communication is admissible *ratione temporis*. In respect of Case no. 6825/94, the Court of Appeal's judgment of 6 July 1999, which upheld the author's conviction, and the Supreme Court of Sri Lanka's denial of leave to appeal, on 28 January 2000 refusing

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[9] Article 2, paragraph 1, of the Convention against Torture.

[10] Article 126(1), Constitution of Sri Lanka provides as follows: "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right." (emphasis added). Article 16 (1) of the Constitution provides: "All existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter [Chapter III on Fundamental Rights]." Further, Article 80(3) Constitution of Sri Lanka provides: "No court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of [any Act of Parliament] on any ground whatsoever." As a former Chief Justice of Sri Lanka, Justice S. Sharvananda, has commented (see Justice S. Sharvananda, *Fundamental Rights in Sri Lanka*, (Sri Lanka: 1993) at p. 140): "Article 80(3) vests enacted law with finality in the sense that the validity of an Act of Parliament cannot be called in question in any court or tribunal. In this Constitutional scheme, there is no room for the introduction of the concept of 'due process of law' or notions of reasonableness of the law and natural justice as has been done by the Supreme Court of India in Maneka Gandhi's case A.I.R. (1978) SC 597 at 691-692. As stated earlier, in Sri Lanka, it is not open to a court to invalidate a law on the ground that it seeks to deprive a person of his liberty contrary to the court's notions of justice or due process."

[11] *Velmurugu v AG* (1981) 1 SLR 406; *Saman v Leeladasa* SC Appl. No. 4/88 SC Minutes 12 December 1988.

leave to appeal, were both given after the First Optional Protocol came into force for Sri Lanka. He submits that the right to a fair trial comprises all stages of the criminal process, including appeal, and the due process guarantees in article 14 apply to the process as a whole. The alleged violations of the rights protected under article 14, by the Court of Appeal, are the primary basis for this communication. His claims are said to be admissible *ratione temporis* inasmuch as they relate to continuing violations of his rights under the Covenant. He argues that the denial of a right to a remedy in relation to the claims under article 2, paragraph 3, read together with articles 7 and 14 (para. 3.7), continues. As to his claims under article 14, the author remains incarcerated without prospect of release or retrial, which amounts to a continuing violation of his right not to be subjected to prolonged detention without a fair trial. With respect to Case nos. 6823/94 and 6824/94, the author submits that he has remained incarcerated pending trial for a total of eight years at the time of submission of his communication, three of which were after the entry into force of the Optional Protocol.

3.12 Regarding a remedy, the author submits that release is the most appropriate remedy for a finding of the violations alleged herein, as well as the provision of compensation, pursuant to article 14, paragraph 6, of the Covenant.

The State party's submissions on admissibility and merits

4.1 By submission of 4 April 2002, the State party argues that the communication is inadmissible *ratione personae*. It submits that it did not receive a copy of the power of attorney and if it were to receive same it would have to check its "validity and applicability." Even if the authorisation were presented to the State party, it submits that an author must personally submit a communication unless he can be prove that he is unable to do so. The author provided no reason to demonstrate that he is unable to present such an application himself.

4.2 The State party argues that the author did not exhaust domestic remedies. Firstly, he could have requested the President for a pardon, to grant any respite of the execution of sentence, or to substitute a less severe form of punishment, as he is empowered to do under article 34(1) of the Constitution. Secondly, he could also have applied to the Supreme Court under article 11 of the Constitution, which prevents torture or other cruel, inhuman or degrading treatment or punishment, about his allegations of torture by army personnel and police officers. Such action would constitute "executive action" in terms of articles 17 and 26 of the Constitution.[12] If the Supreme Court had found that the author was subjected to torture, it could have made a declaration that his rights under article 11 had been violated, ordered payment of compensation by the State, payment of costs of the legal proceedings and, if warranted, ordered the immediate release of the author.

4.3 Thirdly, the State party submits that the author could have complained to the police, alleging that he was subjected to torture as defined by section 2, read together with section 12, of the Convention against Torture. Criminal proceedings could then have been instituted in the High

[12] Article 17 provides that, "every person shall be entitled to apply to the Supreme Court, as provided by article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this chapter." Article 26 provides that, "the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by the executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV."

Court by the Attorney General. Fourthly, he could have instituted criminal proceedings directly against the perpetrators of the alleged torture in the Magistrates Court, pursuant to section 136(1) (a) of the Code of Criminal Procedure Act (No. 15 of 1979). If the Supreme Court had found that the author was subjected to torture or if criminal proceedings had been instituted against the alleged perpetrators, he would either not have been indicted or criminal proceedings, already instituted, would have been terminated.

4.4 With respect to the complaint that his rights under article 14, paragraph 3(c), were violated as he was detained pending trial in Cases Nos. 6823 and 6825, both of which have not yet come to trial, the State party submits that the author could have petitioned the Supreme Court, and complained of a violation, by "executive action" of his "fundamental rights", guaranteed by articles 13 (3), and/or (4), of the Constitution. Such a finding by the Supreme Court could have led to the indictments being quashed or the author's release.

4.5 In its merits submission of 20 November 2002, the State party denies that any of the author's rights under the Covenant were violated or that any provisions of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 (which are promulgated under the Public Security Ordinance) or the PTA violate the Covenant. With respect to the claims under article 14, it submits that the author received a fair and public hearing before a competent, independent and impartial tribunal established by law; he was afforded the presumption of innocence, which is secured under domestic law and recognised as a constitutional right.

4.6 On the issue of access to an interpreter, the State party submits that a person conversant in both Tamil and Sinhalese was present when the author's confession was recorded. This translator was called by the prosecution as a witness during the trial, during which the author had the opportunity to cross-examine him and also to test his knowledge and competency. The State party submits that it was only after this evidence was recorded, during the *voir dire* hearing, that the Court accepted the confession as part of the evidence in the trial. It adds that the author had the free assistance of an interpreter conversant in Tamil during the trial and was also represented by a lawyer of his choice, who was also conversant in Tamil.

4.7 The State party submits that the author had the right to remain silent, or to make an unsworn statement from the dock or to give sworn evidence from the witness stand which could be cross-examined. It denies that he was compelled to testify at trial, to testify against himself or to confess guilt. Rather he elected to give evidence and on doing so the Court was entitled to consider such evidence in arriving at its verdict. The State party explains that under the Sri Lankan Evidence Ordinance, a statement made to a police officer is inadmissible, but under the PTA, a confession made to a police officer not below the rank of ASP is admissible, provided that such statement is not irrelevant under section 24 of the Evidence Ordinance.[13] The voluntariness of such a statement or confession, before admission, may be challenged. Although the burden of proving its case, beyond a reasonable doubt, rests with the prosecution, the burden of proving that a confession was not made voluntarily lies with the person claiming it. According to the State party, this is consistent with "the universally accepted principle of law, namely, he who asserts must prove" and, the reliance on confessions does not amount to a violation of article 14, paragraph 3(g), of the Covenant, and is permissible under the Constitution. It argues that the burden on an accused to

[13] Section 28 provides that, "The provisions of this Act (Prevention of Terrorism Act) shall have effect not withstanding anything contained in any other written law and accordingly in the event of any conflict or inconsistency between the provisions of this Act and such other written law the provisions of this Act shall prevail."

prove that a confession was made under duress is not beyond reasonable doubt but in fact is "placed very low", and requires the accused to "show only a mere possibility of involuntariness."

4.8 On the claim of torture, the State party submits that the trial court and the Court of Appeal made clear and unequivocal findings that these allegations were inconsistent with the medical report adduced in evidence, and that the author had failed to make such allegations to the Magistrate or to the police, prior to the trial. 4.9 On the claim of alleged discrimination with regard to the manner in which the confession made by the author was recorded and considered by the Court, the State party reiterates its arguments raised on the circumstances surrounding his confession, in paragraph 4.6 above. On the issue of a violation of article 14, paragraph 5, it notes that the author was afforded every opportunity to have his conviction and sentence reviewed by a tribunal according to law, and that he merely seeks to question the findings of fact made by the domestic courts before the Committee. Finally, the State party informs the Committee that, following the author's conviction in Case no. 6825/94, the charges in Case nos. 6823/94 and 6824/94 were withdrawn.

The author's comments

5.1 Regarding the State party's argument that the communication is inadmissible *ratione personae*, the author submits that the power of attorney was included in the submission, and notes that his imprisonment prevented him from submitting the communication personally. He adds that it is common practice for the Committee to accept communications from third parties, acting in respect of individuals incarcerated in prison.

5.2 On the issue of exhaustion of domestic remedies, the author submits that the obligation to exhaust all available domestic remedies does not extend to non-judicial remedies and a Presidential pardon which, as an extraordinary remedy, is based upon executive discretion and thus does not amount to an effective remedy, for the purposes of the Optional Protocol.

5.3 The author reaffirms he was unable to seek constitutional remedies in respect of any of the judicial orders or relevant legislation relating to the admissibility of the alleged confession, or detention pending trial, given that the Sri Lankan Constitution does not permit judicial review of judicial action, or of enacted legislation. Thus, he could not pursue constitutional remedies in respect of the decision of the domestic courts to admit the alleged confession, or domestic legislation which renders admissible statements made before the police and places the burden of proof regarding the irrelevance of such statements on the accused.

5.4 On whether the author could have sought to have the perpetrators of the alleged torture prosecuted, he submits that the obligation to exhaust domestic remedies does not extend to remedies which are inaccessible, ineffective in practice, or likely to be unduly prolonged. He recalls that the applicable laws do not conform to international standards and in particular to the requirements of article 7 of the Covenant. Consequently, remedies against torture are ineffective. The author did not file a criminal complaint that the alleged confession was extracted from him under torture, given his fear of repercussions while he remained in custody. He notes than when he placed these allegations on record, during the *voir dire* hearing before the High Court, no investigations were initiated.

5.5 On the issue of exhaustion of domestic remedies, in relation to the author's detention pending trial and the delay in trial, the author submits that only "available remedies" must be exhausted. There is no specific right to a speedy trial under the Constitution, and, to date, the courts have not interpreted the right to a fair trial as including the right to an expeditious trial. Furthermore, the Constitution explicitly provides for the possibility of detention pending trial and, in any event, stipulates that constitutional remedies are not applicable to judicial decisions, for example when a court decides to grant frequent adjournments at the request of the prosecution, leading to trial delays.

5.6 On the merits, the author reiterates the arguments in his initial communication. With respect to the information provided by the State party on Case Nos. 6823/94 and 6824/94, the author confirms that the charges relating to the former case have been withdrawn and therefore "provides no further submissions in respect of these proceedings". However, no information is available on whether the charges in the latter case have been dropped, and the author submits that he may still be brought to trial on this charge.

Issues and proceedings before the Committee

Consideration of Admissibility

6.1 Before considering any claim contained in the communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

6.2 As to the question of standing and the State party's argument that author's counsel had no authorisation to represent him, the Committee notes that it has received written evidence of the representative's authority to act on the author's behalf and refers to Rule 90 (b) of its Rules of Procedure, which provides for this possibility. Thus, the Committee finds that the author's representative does have standing to act on the author's behalf and the communication is not considered inadmissible for this reason.

6.3 Although the State party has not argued that the communication is inadmissible *ratione temporis*, the Committee notes that the violations alleged by the author occurred prior to the entry into force of the Optional Protocol. The Committee refers to its prior jurisprudence and reiterates that it is precluded from considering a communication if the alleged violations occurred before the entry into force of the Optional Protocol, unless the alleged violations continue or have continuing effects which in themselves constitute a violation of the Covenant. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations of the State party.[14] The Committee observes that although the

[14] E. and A. K. v. Hungary, Case no. 520/1992, Decision of 7 April 1994, and K. V. and C. V. v. Germany, Case no. 568/1993, Decision of 8 April 1994, Holland v. Ireland, Case no. 593/1994, Decision of 26 October 1996.
[15] B.d.B. v. Netherlands, Case no. 273/1988, Decision of 30 March 1989, and Yves Cadoret v. France, Case no. 221/1987, Decision of 11 April 1991 and Herve Le Bihan v. France, Case no. 323/ 1988, Decision of 9 November 1989. 16. Lubuto v. Zambia, Case no. 390/1990, Views adopted on 31 October 1995; Neptune v. Trinidad and Tobago, Case no. 523/1992, Views Adopted on 16 July 1996; Sam Thomas v Jamaica, Case no. 614/95, Views adopted on 31 March 1999; Clifford McLawrence v Jamaica, Case no.702/96, Views adopted on 18 July 1997; Johnson v. Jamaica, Case no. 588/1994, Views adopted on 22 March 1996. 17. Berry v. Jamaica, Case no. 330/1988, Views adopted on 4 July 1994.

author was convicted at first instance on 29 September 1995, i.e. before the entry into force of the Optional Protocol for the State party, the judgement of the Court of Appeal upholding the author's conviction, and the Supreme Court's order refusing leave to appeal were both rendered on 6 July 1999 and 28 January 2000, respectively, after the Optional Protocol came into force. The Committee considers the appeal courts decision, which confirmed the trial courts conviction, as an affirmation of the conduct of the trial. In the circumstances, the Committee concludes that it is not precluded *ratione temporis* from considering this communication. However, as to the author's claims under article 26, article 2, paragraph 1 alone and read together with article 14, and his claim under article 9, paragraph 3, relating to his automatic remand in detention without bail, the Committee finds these claims inadmissible *ratione temporis*.

6.4 With respect to the State party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee reiterates its previous jurisprudence that such pardons constitute an extraordinary remedy and as such are not an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 Having regard to the author's claim of a violation of article 7 and considering it as limited to torture raising fair trial issues, the Committee notes that this issue was considered by the Appellate Courts and dismissed for lack of merit. On this basis, and considering that the author was refused leave to appeal to the Supreme Court, the Committee finds that the author has exhausted domestic remedies.

6.6 As to the claim of a violation of article 14, paragraph 5, as the Court of Appeal upheld the author's conviction, despite alleged "irregularities" during the trial, the Committee notes that this provision provides for the right to have a conviction and sentence reviewed by a higher tribunal. As it is uncontested that the author's conviction and sentence were reviewed by the Court of Appeal, the fact that the author disagrees with the outcome of the court's decision is not sufficient to bring the issue within the scope of article 14, paragraph 5. Consequently, the Committee finds that this claim is inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.7 The Committee therefore proceeds to the consideration of the merits of the communication regarding the claims of torture as limited in paragraph 6.4 above and unfair trial - article 14 alone and read with article 7.

Consideration of the Merits

7.1 The Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim of a violation of article 14, paragraph 3 (f), due to the absence of an *external* interpreter during the author's alleged confession, the Committee notes that this provision provides for the right to an interpreter during the court hearing only, a right which was granted to the author. However, as clearly appears from the court proceedings, the confession took place in the sole presence of the two investigating officers – the Assistant Superintendent of Police and the Police Constable; the latter typed the statement and provided interpretation between Tamil and Sinhalese. The Committee concludes that the author was denied a fair trial in accordance with article 14, paragraph 1, of the Covenant by solely relying on a confession obtained in such circumstances.

7.3 As to the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in Case no. 6825/1994, which has remained unexplained by the State party, the Committee notes with reference to its *ratione temporis* decision in paragraph 6.3 above, that more than two years of this period, from 3 January 1998 to 28 January 2000, relate to the time after the entry into force of the Optional Protocol. The Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3(c), and 5, read together, confer a right to review of a decision at trial without delay. In the circumstances, the Committee considers that the delay in the instant case violates the author's right to review without delay and consequently finds a violation of article 14, paragraphs 3(c), and 5 of the Covenant.

7.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary, the Committee must consider the principles underlying the right protected in this provision. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt. The Committee considers that it is implicit in this principle that *the prosecution* prove that the confession was made without duress. It further notes that pursuant to section 24 of the Sri Lankan Evidence Ordinance, confessions extracted by "inducement, threat or promise" are inadmissible and that in the instant case both the High Court and the Court of Appeal considered evidence that the author had been assaulted several days prior to the alleged confession. However, the Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in Section 16 of the PTA. Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7. The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3(g), read together with article 2, paragraph 3, and 7 of the Covenant.

7.5 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.

7.6 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

7.7 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

INDIVIDUAL COMMUNICATION FILED BY ANTHONY MICHAEL EMMANUEL FERNANDO TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

I. INFORMATION CONCERNING THE AUTHOR OF THE COMMUNICATION

1.1 The author of this application is Anthony Michael Emmanuel Fernando, a Sri Lankan national, and an English teacher by profession. The Applicant was born on 1st September, 1954 at Colombo, Sri Lanka, and is ordinarily resident at No. 187/70A, Jaya Samagi Mawatha, Hospital Road, Dehiwela, Sri Lanka.

1.2 The author is represented by

Kishali Pinto-Jayawardena of No 12B Sarasavi Gardens, Nawala Road, Sri Lanka; and
Suranjith Hewamanne of No 530/7 Havelock Road, Colombo 6, Sri Lanka,

who, as counsel, are assisted by the *Asian Human Rights Commission* of Unit D, 7/F Mongkok Commercial Centre, 16-16B, Argyle Street, Kowloon, Hong Kong, *Asian Legal Resource Centre* of Unit D, 7/F Mongkok Commercial Centre, 16-16B, Argyle Street, Kowloon, Hong Kong, *World Organization Against Torture* of OMCT International Secretariat, PO Box 21, 8, rue du Vieux-Billard, CH-1211 Geneva 8, Switzerland and INTERIGHTS (International Centre for the Legal Protection of Human Rights), Lancaster House, 33 Islington High Street, London N1 9LH, UK (A letter of authorization from the Applicant appointing the above attorneys-at-law as his legal counsel is attached at **Annex A**).

1.3 The Applicant is currently held in Welikada Prison, Borella, Sri Lanka, where he is serving one year's imprisonment in connection with his conviction for contempt of court by the Supreme Court of Sri Lanka on 6 February 2003.

II. STATE CONCERNED

2.1 The State Party to the International Covenant on Civil and Political Rights ('the Covenant' or 'ICCPR') and the First Optional Protocol against which the communication is directed is the Democratic Socialist Republic of Sri Lanka.[1]

III. ALLEGED BREACHES OF THE ICCPR

3.1 It is submitted that this case, which arises in relation to a conviction for contempt of court by the Sri Lankan Supreme Court in Case S.C. F/R No. 55/03 (*Fernando v. AG of Sri Lanka and others*), and imprisonment consequent to that conviction, involves breaches of Article 9, Article 14 and Article 19 of the Covenant relating to the Applicant's trial, conviction and sentence, and Articles 7 and 10 of the Covenant, relating to the circumstances and conditions of his subsequent detention.

[1] Sri Lanka acceded to the International Covenant on Civil and Political Rights ('ICCPR') on 11 June 1980 (entry into force on 11 September 1980) and the First Optional Protocol to the ICCPR on 3 October 1997 (entry into force on 3 January 1998). It also became party to the Convention against Torture and Other Forms of Cruel, Degrading and Inhuman Treatment or Punishment ('CAT') on 3 January 1994.

3.2 More specifically, the Applicant's claim relates to:

a) The criminal process involving the Applicant *in Fernando v. A.G. of Sri Lanka and others* S.C. F/R No. 55/03. This culminated in the Supreme Court's conviction of the Applicant of contempt of court on 6 February 2003 and its decision to impose a sentence of one year's 'rigorous imprisonment' for contempt. This verdict was reached in the absence of any hearing prior to the conviction, without any specific charge being against the Applicant and without affording the Applicant any opportunity to seek access to counsel, and was not subjected to any further appeal hearing. It is submitted that this process has been seriously flawed and the result is a failure to accord the Applicant a fair hearing by a 'competent, independent and impartial tribunal', in breach of his rights under Article 14 of the Covenant.

b) The use of contempt proceedings in response to the applicant's attempt to bring an action in good faith by filing fundamental rights petitions (under the Constitution of Sri Lanka) and the consequent breach of his rights under Article 19 of the Covenant.

c) The conditions of imprisonment and alleged ill-treatment of the Applicant while in prison following his detention, in breach of Articles 7 and 10 of the Covenant.

These grounds are further elaborated below (see paras. 3.4 to 3.6).

3.3 **Summary of Facts:** The Author makes the following submissions in relation to S.C. F/R No. 55/03:

3.3.1 The Applicant filed a workman's compensation claim before the Deputy Commissioner of Workmen's Compensation. Following rejection of this claim, he made further complaints to various other authorities,[2] and ultimately filed two separate constitutional petitions before the Supreme Court of Sri Lanka, alleging breach of his fundamental rights guaranteed under the Constitution of Sri Lanka. The Supreme Court consolidated these two petitions for hearing.

3.3.2 The Applicant then filed a further petition on 30.1.2003 alleging that the consolidation of these two petitions (which were, according to him, two separate petitions that properly ought to have been heard separately), had affected his right to be heard in a just and fair manner and had violated his constitutional rights to fair trial. This petition impleaded, among others, the Chief Justice of Sri Lanka and two other sitting judges of the Supreme Court. The Applicant had further filed a motion on 5.2.2003 that this petition should not be listed for hearing before the Chief Justice of Sri Lanka who had presided over the Bench that had heard and dismissed his consolidated rights petitions (See copy of the petitions filed in SC F/R NO. 55/03 attached herein at **Annex B and the said Motion annexed as B:1**).

3.3.3 During the hearing into this motion on 6 February 2003, by a Bench comprising, *inter alia*, the Chief Justice, the applicant was convicted summarily of contempt of court and the

[2] These included the Deputy Commissioner, the Sri Lankan Human Rights Commission, the Parliamentary Commissioner for Administration (Ombudsman) and the Judicial Service Commission.

Registrar of the Court was directed to have him removed to prison forthwith (See copy of the journal entry relating to the dictated order of the Supreme Court dated 6 February 2003 at **Annex C**). The Applicant was taken to Prison directly from the Court. The operative part of the said journal entry reads as follows:

"The petitioner has been asked to show cause as to why he should not be dealt with for contempt of Court. Court, accordingly, found him guilty for contempt of Court and sentences him to one year's rigorous imprisonment for contempt of Court."

Registrar to inform the Prison Authorities to arrest him.'

3.3.4 Approximately two weeks later,[3] a second contempt order was handed down by the Chief Justice of Sri Lanka (see **Annex D**). The operative part of said Order states that:

"The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and inssisted [sic] on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. Inspite [sic] of the warning he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year Rigorous Imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed."

It may be noted, as apparent in this Order, that the Applicant neither used offensive language nor insulted the justices.

3.3.5 The law governing the Supreme Court of Sri Lanka's powers to punish individuals for contempt of court is set out in Article 105 (3) of the Constitution of Sri Lanka 1973 ('the Constitution'), which provides as follows:

"The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this Article, whether committed in the presence of such court or elsewhere:

[3] This order does not specify on its face the date on which it was handed down. In fact the second Order was contrary to normal practice in appellate courts where, if a longer order is forthcoming, a referral is made in the first order specifying that reasons will be given later. It seems, rather, that this second Order followed national and international condemnation of the sentencing of the Applicant. (see Annex D, documents marked D1, D2, D3 and D4 3

Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution to punish for contempt of itself."

3.3.6 It may be noted that Article 105(3) does not include any procedures for providing the alleged contemnor with i) details of the charge against him, ii) an opportunity to consult a lawyer or make out a defence or iii) appeal against the judgment and order of the Supreme Court. Neither does it specify the sentence to be imposed in cases of contempt.[4] Despite numerous recommendations made by the Sri Lankan legal profession, and others,[5] no statutory provisions regulating the Supreme Court's contempt powers have been framed to date—though clearly circumscribed by Constitutional law (Article 12(1), equality before the law) and international law (ICCPR Article 14, fair hearing), as argued.

3.4 **Fair Hearing:** It is submitted that the judicial process culminating in the Applicant's conviction for contempt and his imprisonment immediately thereafter breaches his right to fair hearing, as guaranteed by Article 14 of the Covenant, and in particular of Article 14(1), 14(2), and 14(3) a), b), c) and e), as follows:

a) Firstly, the Applicant was denied a genuine hearing on the contempt matter and no inquiry was held into this matter (as evident in **Annex C** and **D**); consequently, the finding of guilt and sentencing were not supported by trial or inquiry. Yet in *Re Pollard*,[6] the Judicial Committee stated that 'no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it be given to him.'

b) Secondly, no opportunity was given for the preparation and presentation of a defense and, therefore, the Judges had no opportunity to take into consideration any defense when they decided that the Applicant was guilty of criminal contempt. As there was no hearing on mitigation of sentence, the judges had no opportunity to address issues relating to mitigation. The judgment of guilt and sentencing to one year's rigorous punishment is, as such, fundamentally flawed. As pointed out by the *UN's Special*

[4] Sections 792 to 797 of the Sri Lankan Civil Procedure Code (Ordinance No 2 of 1889 (as amended)) govern the powers of the subordinate courts to punish individuals for contempt. They provide, *inter alia*, that a day must be set for a hearing of a contempt charge and that, at such hearing, all evidence must be recorded, including the minute of the judge as to the accused's behavior. Thereafter, if the person is found guilty, the conviction is recorded, setting out the reasons for the conviction and including an adjudication of the material facts of the accused's behavior and language. However such provisions do not apply to the contempt of court powers of appellate courts, governed by Section 105(2) of the Constitution. This Section empowers the Supreme Court and Court of Appeal to punish for contempt of itself. Read with Article 136, these remain the only provisions that impact on the rationale and procedure for contempt of court proceedings in the appellate courts. Article 136 authorises the Chief Justice (with any three Supreme Court justices nominated by him) to make rules regulating generally the practice and procedure of the Court, including the making of rules as to the proceedings in the Supreme Court and Court of Appeal in the exercise of the several jurisdictions conferred on such courts by the Constitution. No such rules relating to contempt of court have, to date, been formulated by the Supreme Court.

[5] Presently, due to agitation from media lobbying bodies in the country including the Editors Guild and the Free Media Movement, a Parliamentary Select Committee has been appointed by the Government to consider the drafting of contempt of court legislation on the lines of similar laws prevalent in India and the United Kingdom.

[6] LR 2 PC 106 (1868).

Rapporteur on the Independence of the Judiciary and the Legal Profession in a press release dated 17th February 2003 (see **Annex E**), it is clearly established in law that contempt of court cases are not an exception to the right of an accused to present a defense.

c) Thirdly, it is doubtful whether there is proof as to whether the Applicant has committed a contempt in the first place. The applicant appears to have been convicted of that variant of contempt law known as 'scandalising the court'.[7] Yet the leading judicial authority in English law on 'scandalising the court', *R v. Gray*, makes a distinction between two types of comment during trial.[8] According to Lord Russell, there is a distinction between 'reasonable argument and expostulation' on one hand and 'scurrilous personal abuse of a judge as a judge' on the other. It was only the latter that Lord Russell believed to be contempt of court. This distinction was confirmed in a series of English cases, as it is now very rare in leading common law jurisdictions for individuals to be found guilty of 'scandalising the court'.[9]

d) Fourthly, the judges had not come to the finding that Mr. Fernando was acting with the intention of disturbing the court (see **Annex C** and **D**). A deliberate intention to commit contempt of court has not been established.

e) Fifthly, the Applicant was denied a fair hearing by an 'impartial' tribunal (Article 14(1)). While contempt hearings inevitably involve judges judging in their own cause, it is essential that they be conducted in such a way as to ensure fairness in the administration of justice. In this case, the same judges heard the Applicant's initial petition, appeal against this petition, and contempt hearing. This violated the rule against bias and was contrary to national law in the following respects:

(i) Hearing the appeal against the initial petition was contrary to the provisions of Section 49(1) of the Judicature Act No 2 of 1978 (as amended), which stipulates that (except with the consent of both parties) no judge shall be competent, and in no case shall any judge be compellable to exercise jurisdiction in any action, prosecution, proceeding or matter in which he is a party or personally interested.

(ii) Sub-section (2) of that section provides that no judge shall hear an appeal from or review any judgement, sentence or order passed by himself.

(iii) Sub-section (3) of that section states that where any judge who is a party or personally interested, is a judge of the Supreme Court or the Court of Appeal, the action, prosecution, proceeding or matter to or in which he is a party or is interested, or in which an appeal from his judgement shall be preferred, shall be heard or determined by some other Judge or Judges of the said court.

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[7] *Roach v. Garvan*, (1742) 2 Atk 469.
[8] [1900] 2 *QB* 36 at para. 40.
[9] *Metropolitan Police Commissioner ex parte Blackburn (No 2)* [1968] 2 *QB* 150; C. Walker, *Scandalising in the Eighties* (1985) 101 *LQR* 359; Richard Stone, *Textbook on Civil Liberties and Human Rights*, 2003 at 275.

(iv) Likewise, it is well-established in domestic law that there are clear pitfalls in permitting the judge who has been object of the contempt to impose the penalties (*R v. Powell* (1993) 98 *Cr App. R* 224). In *Karttunen v. Finland* (387/89) and *Gonzalez del Rio v. Peru* (263/87), the Committee has found that tribunals have not been impartial and independent and accordingly that Article 14 has been breached.[10] In the latter case, the Committee stated that 'the right to be tried by an independent and impartial tribunal is an absolute right and may suffer no exception' (at para. 5.2). The European Court of Human Rights has also established that the right to a hearing by an impartial and independent tribunal requires both a lack of subjective bias on the part of the court and the existence of objective guarantees effectively removing any legitimate doubt as to the court's impartiality.[11]

f) Sixthly, the hearing in respect of the contempt matter was held summarily, with the applicant being given no opportunity either of being informed in detail of the nature and cause of the charge against him, or having adequate time and facilities for the preparation of his defence or to communicate with counsel (Article 14(3) (a), (b), (d)). The Human Rights Committee has in the past expressed disquiet at accelerated procedures of this sort[12]

g) Seventhly, the Applicant was convicted, sentenced and imprisoned without being given any opportunity to appeal against his conviction or sentence (Article 14(5)). Under Sri Lankan law there is no provision for appeal against a judgment of the Supreme Court, including any conviction or sentence awarded by the Supreme Court for contempt of

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[10] The Committee's decision that the communication in the case of *Rogerson v. Australia* (802/1998) was inadmissible can be distinguished from the present Communication on its facts. While that case also involved conviction for contempt, the alleged lack of impartiality of the Supreme and High Courts of Australia was not substantiated. Furthermore, in that case, the appeal against the Supreme Court's decision for contempt was adjudicated by the Northern Territory Court of Appeal. As discussed, in the current case no such appeal of the contempt conviction before different judges sitting in a different court was available.
Furthermore, the Committee's decision in *Collins v. Jamaica* (240/1987) can be distinguished from the current case. In that case the author of the communication (involving the alleged impartiality of a tribunal on the ground that a judge's remark at a preliminary hearing amounted to prejudice) had not alleged in which respect the instructions given by the judge to the jury were either arbitrary or reflected bias and, furthermore, the author's counsel, when told about the remark, had opined that it was preferable to let the trial proceed.

[11] *See Piersack v. Belgium* (8692/79) (where the judge presiding in the Belgian case had previously been involved in the case as a public prosecutor. While the Court did not consider the judge subjectively biased, it held that Article 6 had been breached on the basis of the objective test because effective guarantees of impartiality were not in place.); *Hauschildt v. Denmark* (10486/83) (where presiding Danish judges, at first instance and on appeal, had previously been involved in the case. They had, *inter alia*, taken numerous decisions regarding detention on remand and other procedural matters. The European Court stated that the impartiality and independence of the judiciary in criminal proceedings is required not only to inspire public confidence but also to inspire the confidence of the accused (para. at 48) and held that the facts objectively justified the accused's fear that the Danish courts had not been impartial and independent, and accordingly found a breach of Article 6. (para. 52)); *Oberschlick No.1 v. Austria* (11662/85); *De Haan v. the Netherlands* (22839/93); *Feh v. Austria* (14396/88).

[12] *See, e.g.*, Doc A/41/40, para. 292 (Finland). *See also* Human Rights Committee, General Comment 13, para. 9, where the Committee states 'What is "adequate time" [for the preparation of a defence] depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.' Further, in *Smith v. Jamaica* (282/88), the Committee held that four hours was insufficient for preparation of a defence, and recalled its previous jurisprudence establishing that "the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms"(at para. 10.4).

court. While a review petition may be submitted in respect of such matters, it is not available as a matter of right, and only at the discretion of the Court, and is, in any event, usually heard by the same panel of judges who heard the matter in which they had earlier passed judgment.[13] The Human Rights Committee has clearly indicated that, while a review process will not always be mandatory, in cases resulting in imprisonment of the accused, review by a higher tribunal is required by Article 14(5).[14] In *Salgar de Montejo v. Colombia* (64/79), the Committee clarified that the expression 'according to law' in article 14(5) did not leave the right to appeal to the discretion of national legislators but that these words merely stated that the modalities of the appeal would be as established by national law (at para. 10.4). Furthermore, it established that the right to an appeal applies to all 'serious offences', characterised as those which result in imprisonment.[15] In addition, the Committee has made observations regarding the scope of such appeals, noting that they require substantial review of conviction and sentence.[16]

h) Eighthly, the sentence of one year's imprisonment is grossly disproportionate to the offence which the Applicant was found to have committed. Sentences of imprisonment are rarely awarded in cases of contempt, the usual course being for courts to request the alleged contemnor to tender an apology or to pay a fine. Indeed, in England, it has now been over 100 years since a prison sentence has been handed down in cases of 'scandalising the court' and over 60 years since a successful action of any sort was brought under this heading (*Gilbert Ahnee v. D.P.P.*).[17]

i) In considering the issue of fair trial, it is also a relevant consideration that there had been much international and national concern expressed regarding the judicial conduct of Chief Justice Sarath Nanda Silva who was the presiding judge in this case. For example, in his report in April 2003 to the UN Commission on Human Rights, the United Nations Special Rapporteur on the Independence of the Judiciary wrote,

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[13] Review powers of the Supreme Court of Sri Lanka are not conferred by an express constitutional or statutory provision. In the absence of such, the Supreme Court has declared that there is no right of review but that as a superior court of record, the Supreme Court has a limited power of review in the exercise of its inherent jurisdiction only in exceptional circumstances, namely where a decision is made *per incuriam*, in respect of clerical errors, ambiguous language or where new evidence of importance is concerned and has otherwise no power to review or rehear or vary any judgement or order already made. *The Jeyaraj Fernandopulle Case* 1996 (1)SLR, p. 80.

[14] *See* the Human Rights Committee, General Comment 13 at para. 17 which states that: 'Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.2.'

[15] It may be noted that Montejo's prison sentence was for one year as in this case.

[16] In *Reid v. Jamaica* (355/89) the Committee held that the 'State party is under an obligation to substantially review the conviction and sentence' (para. 14.3). It further noted in *Perera v. Australia* (536/93) that while Article 5(3) does not require a court to proceed on a factual retrial, the Court should 'conduct an evaluation of the evidence presented at the trial and of the conduct of the trial.' (at para. 6.4)

[17] *DPP v. Gilbert Ahnee & Ors* (1994) SCJ 100.

178. The Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief, Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges (which is set for hearing on 27 February 2003).[18]

(*See also* **Annex F** - the Report of the International Bar Association, 2001, Sri Lanka; Failing to Protect the Rule of Law and the Independence of the Judiciary).

3.5. **Arbitrary Detention:** It is submitted that the imprisonment of the applicant without a fair trial amounts to arbitrary detention and is in breach of Article 9 of the Convention. The UN Working Group on Arbitrary Detention states that:

> *"To enable it to carry out its tasks using sufficiently precise criteria, the Working Group adopted criteria applicable in the consideration of cases submitted to it, drawing on the above-mentioned provisions of the Declaration and the Covenant as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Consequently, according to the Group, deprivation of liberty is arbitrary if a case falls into one of the following three categories:*

A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)(Category I);

B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);

C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III). (Fact Sheet No.26, The Working Group on Arbitrary Detention)'

3.6. **Freedom of Expression:** It is further submitted that the use of powers of criminal contempt in relation to the Applicant's submission of fundamental rights petitions before the Court is wholly disproportionate, thereby violating his right to freedom of expression as guaranteed by Article 19 of the Covenant. This is particularly the case here where the use of such powers has resulted in one year's 'rigorous imprisonment' for the alleged contemnor. 'Rigorous imprisonment' is differentiated from simple imprisonment in Section 52 (Cap. 111) of the Sri Lankan Penal Code (Ordinance No. 2 of 1883 (as amended))—the applicable provision specifying a court's power to impose punishment—as punishment 'involving hard labour'. Indeed this type of punishment is the second most severe form of punishment next to the imposition of the death penalty. As such, this exercise of contempt powers is neither 'prescribed by law' nor 'necessary to protect the administration of justice' or 'public order' in Sri Lanka (Article 19(3)(b)):

[18] E/CN.4/2003/65/Add.1 25, February 2003.

3.6.1. It is inevitable and indeed desirable that freedom of expression be limited in certain cases. This was recognised by the drafters of the *International Covenant* when they stated: 'The general principle that, "everyone shall have a right to freedom of expression" was not in itself a controversial issue. Differences of opinion arose on the precise scope and substance of freedom of expression'.[19] As a response to these legitimate differences, Article 19 of the Covenant envisages that the exercise of the right of freedom of expression carries with it, 'special duties and responsibilities' and further that it may be subject to restrictions. However, any such restrictions must be shown to be 'clearly provided by law' and 'necessary' for one of a number of specified purposes, including 'protecting the rights or reputations of others, and/or national security, public order, public health or morals'.[20]

3.6.2 The Human Rights Committee has clearly established that 'any restriction on the right to freedom of expression must meet cumulatively the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3(a) and (b) of article 19 and it must be necessary to achieve a legitimate purpose'.[21] Clearly, then, the right to freedom of expression can be restricted but these fetters can be imposed only in exceptional, clearly stated cases, where it can be demonstrated that there is a 'pressing social need'.[22] The Committee's position echoes the words of America's greatest jurist, Justice Oliver Wendell Holmes, who cautioned:

> *"I think we should be eternally vigilant against attempts to check the expression of opinion . . . unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."*

3.6.3. Given this context, it is submitted that the treatment of the applicant and the consequent restriction on his freedom of expression fails to meet any of the three pre-conditions identified by the Human Rights Committee:

a) First, the restriction is not provided by law because the measures in question, arising from the Supreme Court's powers of criminal contempt, are not clearly delineated and indeed are so wide in their ambit that, it is submitted, they do not meet the test of certainty required for any 'law'. The general rule here is that, 'the relevant national law must be formulated with sufficient precision to enable the persons concerned-if need be with appropriate legal advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[23] This formulation encompasses two discrete elements. First, the legal norm in question must be accessible to citizens. It must be possible for a citizen to identify the norm in question. Second, individuals must have a reasonable prospect of being able to anticipate the consequences of a particular action.[24] Needless to say, many laws are vague and/or poorly drafted, and it is not a requirement of the phrase 'prescribed by law' that there be absolute certainty in every legal rule. However, the Sri Lankan laws on contempt of court (as applied to the applicant) fail the test of 'sufficient precision'. They are opaque and inaccessible and the discretion which

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[19] (A2929, Chap. VI, s124). *Commission on Human Rights*, 5th Session (1949).
[20] *Handyside v. the United Kingdom*, ECHR Application No. 5493/72 para at 48.
[21] *Faurisson v. France* (550/93), *para.* 9.4.
[22] *Handyside, supra* note 19, at para. 48.
[23] *Grigoriades v. Greece* (24348/94) at para. 37.
[24] *Sunday Times v. the United Kingdom*, (6538/74) 1979 at para. 49.

they allow to the Supreme Court in exercising its own powers of contempt is so wide and unfettered that they fail the tests of accessibility and predictability.[25]

b) Second, the latitude afforded to the judiciary regarding its powers of contempt under Sri Lankan law, and the extent to which they operate as a restriction on the right to freedom of expression, are not sufficiently closely related to the aims specified in Article 19, namely the protection of 'public order' or 'the rights and reputations of others' (Article 19, paras. 3(a) and 3(b)). Further, the existence of such potentially wide-ranging contempt laws is not necessary for the achievement of such purposes. It is clear that much more narrowly defined laws aimed at a more concrete purpose are needed to bring the laws within the exceptions enunciated in Article 19.

c) Third, and most importantly, while the right to freedom of expression may be restricted, as stated above, in order to 'protect the rights and reputations of others', and in this instance, to safeguard the administration of justice, the powers of the Supreme Court provided for by Sri Lankan law in relation to contempt of court, including the power to impose sentences of imprisonment for a year, are wholly disproportionate and cannot be justified as being 'necessary' for this end.[26] Indeed, in this instance, it is submitted that the restrictions on the right to freedom of expression have 'jeopardised the right itself".[27] Restrictions on freedom of expression must be narrowly interpreted and any restrictions convincingly established.[28] They must address a 'pressing social need' and, in responding to this social need, the restrictions must be proportionate and the reasons given for the restriction must be relevant.[29]

d) In the alternative, even if the Committee were to find that there is a pressing social need in this case (to secure the administration of justice) and that the applicant was in fact in contempt, the punishment of a year's imprisonment-especially involving hard labor-is in no way a proportionate or necessary response.[30] In many countries, far less draconian laws effectively protect courts from abuse while also safeguarding rights to free expression. This may be seen clearly from a number of cases in which the European Court of Human Rights has considered contempt of court convictions in the context of the free expression guarantees provided in Article 10 of the European Convention on Human Rights and Fundamental Freedoms. The decisions of the European Court reflect the balancing act required between, on the one hand, the necessity of maintaining public confidence in the judiciary for the effective administration of justice and, on the other, the basic right to free expression. In 1997, the European Court in the case of *De Haes & Gijsels v. Belgium*[31] weighed the desire to protect the right to freedom of expression and the Belgian court's interest in protecting the authority of the judiciary and balanced these two

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[25] Any interference with freedom of expression must be prescribed by law. The word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law such as the law of contempt of court or breach of confidence in English common law. Two requirements flow from this expression, that of the adequate accessibility and forseeability of law, to enable the individual to regulate his conduct in the light of the foreseeable consequences of a given action. *Sunday Times*, *supra* note 23, at paras. 45, 47, 49.

[26] In this instance, the author's acts had no direct impact on the rights and of others (see dissenting opinion of Judge Jambrek in *Grigoriades* para. at 3).

[27] HRC General Comment 10(19), Doc a/38/40, p. 10.

[28] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, p. 23, § 49; *Lingens v. Austria*, 8 July 1986, Series A no. 103, p. 26, § 41; and *Jersild v. Denmark*, 23 September 1994, Series A no. 298, p. 26, § 37.

[29] See *Barthold v. Germany* (1985) 7 E.H.R.R. 383, at para. 55.

[30] Per Lord Atkin in the Privy Council case of *Ambard v. Attorney-General for Trinidad and Tobago*, [1961] AC 322. *See also* the public interest in preserving freedom of expression in *Attorney General v. British Broadcasting Corporation C* [1981] A.C. 303, 340 (per Lord Salmon).

[31] 25 EHRR 1, [1997] ECHR 19983/92. This case involved an appeal to the ECHR by two Belgian journalists who were fined (without documented evidence) for having written reports accusing Belgian judges of having allowed their marked political biases to influence an ongoing child custody case.

opposing considerations against the entire background of the case.[32] It found that given the 'seriousness of the circumstances of the case and of the issues at stake the necessity of the interference with the exercise of the applicants' freedom of expression has not been shown.' (para. 49) Indeed the Court further held that, although 'a careful distinction must be drawn between facts and value judgements' (para. 42), accurate allegations regarding the judges' political sympathies could be published when they could 'potentially [be] lending credibility to the idea that those [judges'] sympathies were not irrelevant to the decisions in question.' (para. 44) '[A]lthough Mr. De Haes' and Mr Gijsels' comments were without doubt severely critical,' the Court explained,

> *'they nevertheless appeared to be proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which the court should not be taken to approve, it must be remembered that Article 10 protects not only the substance of the ideas or information expressed but also the form in which they are conveyed.' (para. 48)*

The Court reiterated that 'freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community.' (para. 46).

3.7. **Torture and Ill-Treatment:** It is submitted that the conditions of detention inflicted on the Applicant clearly represent a form of torture and/or cruel, inhuman and degrading treatment and constitute a breach of Sri Lanka's obligations under Article 7 and Article 10 of the ICCPR.

a) Following his imprisonment on 6 February 2003 in the Welikada Prison in Colombo, the Applicant developed a serious asthmatic condition and was taken to the Prison Hospital. As his condition became progressively worse, the Applicant was taken to the National Hospital Colombo and was admitted to the Intensive Care Unit.

b) On 8th February 2003, the Applicant was transferred to Ward No. 44 of the General Hospital but was not given a bed and was made to sleep on the floor with his leg chained as required by the prison authorities. He was permitted to move only for the purpose of calls of nature. Two prison guards stood guard.

c) The Applicant's condition worsened as he developed a chill as he was made to lie on the floor, which made his asthmatic condition worse.

d) The Applicant was told by his wife and the father who visited him on 8th February 2003 that when they went to Welikada prison on 6th February 2003 to see him, no information was given by prison officials as to his whereabouts and his condition. They had to investigate on their own and had found out that Anthony Michael Emmanuel Fernando is warded in the Colombo National Hospital.

e) On 10th February 2003, the Applicant experienced severe pain all over his body but was not given medical attention. His condition was so critical that his father who visited him brought a priest to give the final sacrament given only to persons who are about to die.

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[32] Relying on *Lingens v. Austria*, ECHR 8 July 1986, Series A no. 103, para. 40.

f) The Applicant states that on his discharge from the Hospital on 10 February 2003, and his removal to the prison, he was assaulted several times, specifically between 2 and 5 p.m., when he was beaten by prison guards outside the prison on the road. He was then pushed into a police van where he was kicked repeatedly on the back causing damage to his spinal cord. On his arrival in prison, the Applicant was taken on a stretcher and left to lie near a putrid toilet. He was then stripped naked and left to lie near the toilet for a further 24 hours. Following this sequence of events, the Applicant began to urinate blood and was returned to the hospital in a van. As of 11 February 2003, he has been unable to rise from his bed.

3.7.1. The Applicant's condition aroused considerable concern nationally and internationally, and D'ato Param Cumaraswamy, the United Nations Special Rapporteur on the Independence of the Judiciary and the Legal Profession, visited the Applicant in hospital and reported that he had been severely assaulted while in prison custody and noted that he was 'chained even at the hospital.' (See 27 February 2003 press release of UN Special Rapporteur, **Annex E**).

3.7.2. The Government of Sri Lanka has charged the prison officials allegedly involved in the assault on the Applicant and they are currently on bail pending trial. A fundamental rights petition filed on behalf of the Applicant with respect to his alleged torture and ill-treatment is currently pending hearing before the Supreme Court. (see **Annex G with connected documents marked as Annex G:1 and Annex G:2**)

IV. EXHAUSTION OF DOMESTIC REMEDIES

4.1 It is submitted that the Applicant has exhausted every possible domestic course of action which might constitute a remedy. Under Sri Lankan law there is no provision for any appeal against a judgment of the Supreme Court regarding contempt of court or any other matter. As an exceptional measure, a petition seeking review of a judgment of the Supreme Court may be filed. However such a review petition would usually be heard before the same judges who considered the original petition in the matter.[33]

4.2 In the instant matter, such a review petition was submitted on behalf of the Applicant, and was heard on 2 June 2003 in the Supreme Court by the same panel of three judges which had convicted him for contempt, almost four months after his initial imprisonment. (see **Annex H**) The UN's Special Rapporteur on the Independence of the Judiciary the Legal Profession had occasion to issue a press release welcoming the hearing of this petition and noting with concern the delay in the fixing of the hearing. (See 28 May 2003 press release of UN Special Rapporteur, **Annex I**)

4.3 At the hearing of the review petition, the Court strongly called for an apology from the Applicant and in the absence of the same, stated that it rejected the petition but has reserved order, with no date having been notified for the delivery of said order. The order of the Supreme Court convicting the Applicant and sentencing him to a year's imprisonment is therefore final and conclusive.

4.4 Moreover, as regards constitutional remedies, it may be noted that the Sri Lankan Constitution (Article 126(1))[34] only permits judicial review of 'executive or administrative' as opposed to 'judicial' action. The apex courts in Sri Lanka have also held that judicial review of judicial

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[33] *Infra* note 3.3.6., 3.4 g).

[34] Article 126(1) of the Constitution of Sri Lanka provides as follows: 'The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right.' (emphasis added).

action is not permissible.[35] Therefore, the Applicant is unable to seek any further judicial review of the order applicable to his case or to initiate any challenge to the constitutional provisions granting the Supreme Court powers of criminal contempt.

V. LIMITATION

5.1 This application is admissible *ratione temporis*. The Supreme Court of Sri Lanka's final order on 6 February 2003 convicting the Applicant for contempt of court and sentencing him to a year's imprisonment, and its subsequent order of 2 June 2003 dismissing the review petition filed on behalf of the Applicant, were both passed after the First Optional Protocol came into force for the State Party.

VI. OTHER INTERNATIONAL PROCEDURES

6.1 This matter has not been submitted for examination to any other procedure of international investigation or settlement.

VII. INTERIM MEASURES

7.1 The Applicant requests in this communication that the Committee consider recommending the adoption of interim measures by the State Party pursuant to Rule 86 of the Rules of Procedure. In the past, the Committee has recommended the adoption of interim measures in situations where it is desirable to avoid 'irreparable damage' to the Applicant. For example, in *Stewart v Canada* 538/1993, 1 November 1996, the Committee stated that:

> *"The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy." (para. 7.1)*

7.2 There is every reason for the Committee to request interim measures in the instant matter, in order to ensure that the Applicant does not face the prospect of permanent and irreversible injury.

7.3 Imprisonment itself is irreparable damage, which can be justified only by way of punishment meted out in accordance with law. The imprisonment in the present case does not fall under this category. Thus, if at the end of the inquiry, the Committee comes to finding that the imprisonment is illegal, the irreparable damage is already completed. The imprisonment of an innocent persons is itself irreparable damage of a very high proportion in terms of himself, and his family.

7.4 The Applicant is in great distress and any delay in securing his rights to be free from cruel and inhumane treatment could have irreversible consequences. In this case there is little doubt that any further detention and maltreatment of the Applicant is likely to cause permanent physical injury to him and/or mental injury and/or compound any injuries he has already incurred.

7.5 The Committee is accordingly requested to consider recommending that the State Party adopt interim measures, pursuant to Rule 86 of the Rules of Procedure of the Human Rights Committee, to release the Applicant pending a full impartial and independent hearing into the alleged contempt.

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[35] *Velmurugu v. AG* (1981) 1 SLR 406; *Saman v Leeladasa* SC Appl. No. 4/88 SC Minutes 12 December 1988.

VIII. CONCLUSION

8.1 It is submitted that the Applicant has suffered a violation of his rights as guaranteed by Articles 9 14, 19 7 and 10 and Article 2(3) of the Covenant respectively.

8.2 It is further submitted that given the Applicant's frail state of health and already substantial period of imprisonment-during which he suffered deterioration of his mental health due to imprisonment and degrading treatment-early release from prison would be the most appropriate remedy.[36] The Committee has earlier found release to be the most effective remedy in several cases of breach of the right to fair trial under Article 14.

8.3 Finally, it is submitted that, as a victim of unlawful detention and a miscarriage of justice, the Applicant should be entitled to compensation under Article 14(6) of the Covenant.

IX. RELIEF SOUGHT

9.1 Accordingly, the author hereby requests the Committee:

a) To declare a breach of the Applicant's rights under the Covenant, specifically under Articles 9 and 14, Article 19, Article 10 and Article 7, read with Article 2(3) of the Covenant;

b) To declare that the application of Article 105 (3) of the Sri Lankan Constitution 1973 is incompatible with the Applicant's rights to fair trial, freedom of expression and an effective remedy, under Articles 14 and 19, read with Article 2(3) of the Covenant respectively;

c) To recommend that the State Party consider taking necessary steps to adopt legislative and other measures necessary to give effect to Articles 9 14, 19 7 and 10, as well as Article 2(3) of the Covenant, including framing legislation to regulate the Supreme Court's powers of contempt;

d) To recommend that the State Party commute the Applicant's sentence and order his immediate release from prison; and

To recommend that the State Party award compensation to the Applicant, pursuant to Article 14(6) of the Covenant, for disproportionate punishment in respect of his conviction in Case SC.FR NO. 55/03 (*Fernando v. AG of Sri Lanka and others*) and for the miscarriage of justice suffered as a result of his arbitrary and continued incarceration.

Signed by Author
Anthony Michael Emmanuel Fernando

Dated: 10 June 2003**

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[36] Note recent decision of the ICTY Appeals Chamber in *Kupreskic* that, despite the gravity of the offences charged, in the face of a miscarriage of justice it could not remand the case for retrial. *Kupreskic et al.*, IT-95-16-A, Appeal Judgment, 23 October 2001, at para. 246.

** This communication was registered as communication no; 1189/2003 by the UNHRC and consideration on its merits is now pending. The author was released from prison on October 17, 2003 after he completed ten months of his jail sentence. On 9 January 2004, the UNHRC, responding to the prayer for interim measures in the communication, informed the Sri Lankan government that, in pursuant of Rule 86 of the committee's rules of procedure, the state party (Sri Lanka) should adopt all necessary measures to "protect the life, safety and personal integrity of the author (Michael Anthony Emmanuel "Tony" Fernando) and his family members in order to avoid irreparable damage to them and to inform the committee on the measures taken by the state party in compliance with the decision within 30 days from the date of this Note Verbale, that is, no later than 9 February 2004."

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